Winfield Scott

(See page IV)

AMERICAN BAR ASSOCIATION JOVRNAL

December 1942

Three facts
about
Travelers Group Insurance

Every 33 seconds of every working day last year, a new name was added to the list of those who are protected by Group Life Insurance issued by The Travelers Insurance Company.

Every 4 seconds of every working day the protection afforded by Travelers Group Life Insurance is renewed for some employee.

Every 20 seconds of every working day a claim payment check is issued to some beneficiary under a Travelers Group Insurance Policy.

Moral: Insure in

THE TRAVELERS

HARTFORD, CONNECTICUT

A PIONEER IN GROUP INSURANCE

Published Monthly by American Bar Association at 1140 North Dearborn Street, Chicago, Illinois
Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912
Price: Per Copy, 25c; Per Year, $3; To Members, $1.50; To Students in Law Schools, $1.50. Vol. 28. No. 12

TABLE OF CONTENTS

IN THIS ISSUE

Our Cover—General Winfield Scott is this month's lawyer-soldier study. George R. Farnum of Boston, on page 815, presents a sketch of the life of the grand old warrior, who, as commander in chief, led the expedition in the Mexican War. In paying tribute to Scott upon his retirement, President Lincoln stressed the fact that the American people were his debtors, a debt still willingly recognized by our citizens today. Photograph furnished by The Bettmann Archive, New York City.

New Regional Meetings Plan—New York has been chosen as the city in which the first regional meeting will be held this year, under the supervision of the Committee on Coordination and Direction of the War Effort. In this issue the program is given, a program stressing the Bar's contribution to the war effort. Lawyers and laymen alike may and will participate in the activities planned for the first anniversary of two history-making events, the attack on Pearl Harbor, and the declaration of war by the United States against its enemies.

Soldiers' and Sailors' Civil Relief Act Amendments of 1942—David A. Bridewell of the Chicago Bar analyzes these amendments which further restrict the rights of creditors against those in military service and their dependents, and which clarify ambiguities and correct deficiencies in the 1940 Act, as well as overrule several judicial interpretations of that Act.

Crafts of Law—Professor Karl N. Llewellyn elaborates a phase of the lawyer's usefulness which has probably been intuitively felt by some, but unperceived by the multitude. His thesis is that the ability of the lawyer to get difficult things done makes the lawyer as useful in war as in peace.

Improving Judicial Administration—Roscoe Pound, formerly Dean of Harvard Law School, in an article in this issue elaborates on the idea that "the legal order has swung back and forth between a judicial process, according to authoritative precepts and received technique, on the one hand, and an administrative process, according to intuition and personal discretion of a magistrate or official at the crisis of decision, on the other hand." He deals with the subject historically and prospectively.

War and the Bar—Colonel John D. Langston, of the Selective Service Office, Washington, D. C., gives a vivid picture of the personal, individual service by lawyers in this war, and of the activity of the organized Bar.

Andres Bello—Although the Chilean Civil Code is well known to the legal profession, having been used as a model for the civil codes of several South American countries, it is doubtful that details of the author's life are as familiar to North American lawyers. In this article, Ralph Bosch, of the District of Columbia and New York Bars, traces Bello's life from the time he abandoned the study of medicine to follow Bolivar to London in 1810 until his death in 1865.

Supreme Court Decisions—This month we review all decisions to and including those delivered November 9. Some of these are of great importance.

Ex parte Quirin—The Chief Justice delivered the final opinion in the saboteurs' case. The opinion discloses the meticulous care with which every point raised by counsel for the accused was considered.

Wickard v. Filburn, delivered by Associate Justice Jackson, sustains the validity of the amended Agricultural Act, the limitation of acreage for production of wheat approved by referendum vote of farmers, and reviews the case defining interstate commerce.

Ex parte Kawato, delivered by Associate Justice Black, holds that an alien lawfully residing in this country who becomes an alien enemy because his country makes war on us, may resort to our courts to enforce rights which accrued before the War.

Braverman v. U. S., delivered by the Chief Justice, holds that conviction of a single conspiracy to violate several statutes does not permit the cumulation of the statutory penalties.

There are also important tax decisions and controversies under the Fair Trade Act.

Topical Index—In the back of this number will be found the topical index for Volume 28 of the JOURNAL, the year 1942. From the number of inquiries received in the past we deem it advisable to call this to the attention of our readers. If you plan to have your volume bound, these pages may be removed from this issue and arranged to precede all other material in the bound volume.

Law Lists—The Committee on Law Lists of the Association publishes this month its annual record of approved law lists and also some changes made in the Canons of Ethics and Rules and Standards with reference to law lists.

Announcement

of

1943 Essay Contest

Conducted by

American Bar Association

Pursuant to terms of bequest of Judge Erskine M. Ross, Deceased

Information for Contestants

Subject to be discussed:

"What Should Be the Function of the States in Our System of Government?"

Time when essay must be submitted:

On or before March 16, 1943.

Amount of prize:

Three Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, members of the Board of Governors, officers and employees of the Association.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to six thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and the absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest shall communicate promptly with the Executive Secretary of the Association who will furnish further information and instructions.

American Bar Association

1140 N. Dearborn St. Chicago, Ill.

CURRENT EVENTS

Civil Procedure Rules, Amendments to Be Considered

THE Supreme Court Advisory Committee on Federal Rules of Civil Procedure have announced that in accordance with recent authorization from the Supreme Court, the Committee are about to proceed to the consideration of proposed amendments to those rules. The preliminary work will be under the direction of Judge Charles E. Clark, who serves as Reporter to the Advisory Committee. Judge Clark and a staff under him will prepare a preliminary report with suggestions for submission to the Advisory Committee. It is expected that this preliminary report will be ready for the consideration of the Advisory Committee the early part of the year 1943.

After the Advisory Committee has reached tentative conclusions as to amendments, it is likely that such proposals will be distributed quite generally to the Bench and Bar for suggestions, as was done with the original rules. Meanwhile, any suggestions from the Bench or Bar will be considered and may be addressed to the Supreme Court Advisory Committee on Rules of Civil Procedure, Supreme Court of the United States Building, Washington, D. C.

Notice by the Board of Elections

THE following states will elect a State Delegate for a three-year term in 1943:

Arkansas	Nevada
Colorado	New Hampshire
Delaware	New York
Georgia	Ohio
Idaho	Oregon
Indiana	Rhode Island
Louisiana	Utah
Maryland	West Virginia
Minnesota	

The State of Louisiana will also elect a Delegate to fill a vacancy expiring at the adjournment of the 1943 Annual Meeting.

The following jurisdictions will elect a State Delegate to fill vacancies for the balance of the term indicated:

Hawaii	1944 Annual Meeting
Illinois	1945 Annual Meeting
New Mexico	1944 Annual Meeting
Vermont	1944 Annual Meeting

Nominating petitions for all State Delegates to be elected in 1943 must be filed with the Board of Elections not later than March 25, 1943. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. In order to be timely, nominating petitions must actually be received at the headquarters of the Association before the close of business at 5:00 P. M. on March 25, 1943.

Attention is called to Section 5, Article V, of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group).

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Nominating petitions will be published in the next succeeding issue of the AMERICAN BAR ASSOCIATION JOURNAL which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the JOURNAL. Special notice is hereby given that no more than fifty names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires. State Delegates elected to fill vacancies take office immediately upon the certification of their election.

Board of Elections
EDWARD T. FAIRCHILD, *Chairman*
WILLIAM P. MACCRACKEN
LAURENT K. VARNUM

Minnesota Studies New Judiciary Clause

THE Supreme Court of Minnesota and the Minnesota State Bar Association are actively considering the insertion of a new judiciary clause in the constitution of that state. It is hoped by those engaged in this task that the rule-making power of the Supreme Court may be more fully availed of and that it be more explicitly recognized. The movement also contemplates careful consideration of the extent to which the form and phraseology of the proposed rules of practice and procedure may be harmonized with the federal rules of civil procedure which have now been in force in the federal courts for four years with satisfactory results.

London Library Appeal

SEVEN replies have been received to the appeal published in the November JOURNAL, page 732, for a set of *Corpus Juris* for the Royal Courts of Justice, in London. The publishers, The American Law Book Company, state that they will be happy to present a set. In addition, the Cincinnati Bar Association has offered a set, and five of our members, one of whom is a member of the Supreme Court of the United States, have done the like.

New Regional Meetings Plan

First Meeting in New York City

"WAR and the Lawyer" will be the general theme of the new regional meetings of the Association, the first of which will be held in New York City, December 7 and 8, for the members in the states comprising the First, Second, and Third Judicial Circuits. This meeting will occur on the anniversary of the attack on Pearl Harbor and of the declaration of war, and will constitute an important contribution of the Bar in the observance of that occasion.

After careful study by the Sub-Committee on Regional Conferences of the Board of Governors and by the Administration Committee of the Board, it was determined that regional meetings of the Association should be held to accomplish a two-fold objective: first, to intensify and expand the war services of the Bar; and second, to present opportunities for more active participation in American Bar Association activities by the general membership, particularly for members in areas within which Annual Meetings have not recently been held.

It is the Association's intention to make these regional meetings miniature Annual Meetings of the Assembly so far as practicable, and to provide a program of the high character comparable to that of the Annual Meetings. The Regional Conferences heretofore held under the auspices of the Section of Bar Organization Activities have appealed particularly to bar association executives interested in the problems of bar organization. The regional meetings to be held under this program will be concerned primarily with the lawyer in active practice, his problems, and his contribution to the war effort.

Individual invitations will be given to all members of the Association within the region of each meeting, and notice will be given generally to all members of the Association through the JOURNAL. While this meeting is primarily for members of the Association, each member will be given the privilege of inviting two guests (who may be laymen or lawyers). Invitations are also extended to the officers of state and local bar associations within each region, who are not only invited to attend, but are requested to urge all their committee members engaged in work related to the war effort to attend and participate in the program.

Opportunity will be afforded at each meeting for the presentation of resolutions in the nature of recommendations to the House of Delegates. While these resolutions will not, of course, have binding effect upon the Association, it is expected that they may be helpful in advising the House of the views of members in the various regions of the country.

The first meeting will be held in New York City at the Association of the Bar of the City of New York, 42 West 44th Street. The general committee for the meeting will be composed of State Delegates and members of the Board of Governors from the First, Second, and Third Circuits. The local Committee on Arrangements will be under the chairmanship of Harry Cole Bates of New York City.

The program is designed: (1) To afford opportunity for exchange of information and experiences between lawyers engaged in war work in the several states within those Circuits, and (2) To provide the lawyers of the region with authoritative statements and discussions of war economic controls, developed by the chief officers of the war agencies administering the economic controls.

The tentative program for the New York meeting is as follows:

Monday, December 7

10 A.M.—*War Work Meeting*

1. Welcome by William D. Mitchell, president of the Association of the Bar of the City of New York
2. Response and Statement of Purpose—George Maurice Morris, president of the American Bar Association
3. Mobilizing the Bar for Victory—Tappan Gregory (Statement of activities of War Work Committee)
4. Discussion panel of war work activities:

a. Discussion by War Committee of the Bar of the City of New York—Charles Evans Hughes, Jr.

b. Joseph W. Henderson, War Work Committee member, Third Circuit

c. Raymond E. Baldwin, chairman War Work Committee, Connecticut State Bar

***Luncheon*—Buffet luncheon without speakers**

2 P.M.—*War Time Economic Controls*

1. General problems of consumer control—David Ginsberg, General Counsel, OPA
2. Price Control—Henry Hart, Associate General Counsel in charge of Price Control
3. Rent Administration—Robert W. Wales, Assistant General Counsel in charge of Rent Control
4. Rationing—Thomas E. Harris, Assistant General Counsel in charge of Rationing
5. Enforcement of Regulations—Bronson MacChesney, Associate General Counsel in charge of Enforcement
6. Regulation from the viewpoint of the field agent—Walter Gellhorn, Regional Attorney, OPA
7. Labor Problems with Special Attention to Wage and Salary Controls—Wayne Morse, member National War Labor Board

Monday Evening

7 P.M.—*Dinner*

John Lord O'Brian, General Counsel, War Production Board
(Also speaker representing United Nations' war effort.)

Tuesday, December 8

10 A.M.

1. The report of the Resolutions Committee on any resolutions offered
2. Reports of Special Committees
3. Forum on the impact of war economy on business

a. Problems in War Time Transportation—Talcott M. Banks, Jr., General Counsel, Board of Transportation Research

(Continued on page 861)

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

Amendments of 1942

By DAVID A. BRIDEWELL*
Of the Chicago Bar

THE Soldiers' and Sailors' Civil Relief Act Amendments of 1942,[1] which became law on October 6, 1942, afford still more civil relief to those in military service and their dependents than was afforded by the 1940 Act[2] or the 1918 Act,[3] which was passed during the last World War and after which the 1940 Act was modeled. Correspondingly, the rights of creditors and those who have claims against those in military service and their dependents are further restricted. In addition, these amendments clarify ambiguities and correct deficiencies in the 1940 Act, as well as overrule several judicial interpretations of that Act.

The amendments reflect both a change in the basic philosophy and procedure from the 1940 Act. Whereas the civil relief afforded under the 1940 Act was limited principally to a stay of court actions, within the discretion of the court, the 1942 amendments not only extend the relief afforded in this respect, but afford relief on obligations themselves and change the rights and remedies provided for by such obligations and under the substantive law. It is the purpose of this article to discuss the 1942 amendments and the way in which they change the provisions of the 1940 Act.[4]

The 1940 Act has six articles, designated as follows: I, General Provisions; II, General Relief; III, Rent, Installment Contracts, Mortgages; IV, Insurance; V, Taxes and Public Lands; and VI, Administrative Remedies. The 1942 amendments amend various sections of these articles and, in some instances, add new sections. They also add a new article, Article VII, designated "Further Relief." Since the amendments relate to these articles, it will clarify their discussion if they are discussed in the order in which the articles themselves appear in the 1940 Act.

Article I—General Provisions

There are several important amendments to the sections in this article the effect of which is (1) to increase the protection afforded to those in military service and afford the same relief to others as is afforded to those in the military service of the country, and (2) to assure those in military service and their co-obligors the right to enter into new contracts and waive the protection afforded by the Act, subject to certain limitations.

Accommodation Makers. Paragraphs (1) and (2) of Section 103 have been amended so as to provide that an "accommodation maker, or other person whether primarily or secondarily" liable on a note or other obligation shall be entitled to the same relief, in the discretion of the court, as provided for those in the military service and their dependents. The 1940 Act provided that "sureties, guarantors, endorsers, and others" should be entitled to the same relief. There was a conflict in the court decisions as to whether these words included co-makers or accommodation makers. Hence the amendment settles this controversy.

Sureties on Bail Bonds. Section 103 has been amended by adding a new paragraph (3). It prevents the enforcement against sureties on bail bonds when military service prevents the attendance in court of the principal and, in certain cases, authorizes the court to discharge such sureties and exonerate the bail.

Waiver of Benefits Conferred by Act. Section 103 has been amended by adding a new paragraph (4). It sets forth the requirements with respect to the waiver of benefits conferred by the Act to sureties, guarantors, endorsers, accommodation makers and others primarily or secondarily liable upon the obligations of a person in military service. To be valid, a waiver executed after October 6, the effective date of the amendments, must be in writing and executed as an instrument separate from the obligation or liability in respect to which it applies. Such a waiver becomes ineffective, however, after the person executing it enters military service, or if executed by a dependent of such individual, unless executed by such person or dependent during the period from the receipt of orders to report for induction or military service to the time he reports for induction or service. From this section, it appears that the principal obligor, as well as his sureties, guarantors, endorsers and accommodation makers may, during the period referred to above, waive the benefits of the Act.

Persons Serving With Armed Forces of Allies. A new Section 104 has been added. It extends, subject to certain limitations, the benefits of the Act to persons serving with the armed forces of any allied nation.

Persons Ordered to Report for Induction or for Military Service. A new Section 106 has been added. It entitles any person who has been ordered to report for induction under the Selective Training and Service Act or any person in the Enlisted Reserve Corps who has been ordered to report for military service to the relief

*Director for Chicago and Co-Director for Illinois, Public Information Program, American Bar Association. Author, *Selected Illinois Statutes, Bridewell's Illinois Cases, Statutes and Readings on Bailments, Liens and Pledges* and *Bridewell on Credit Unions.*

1. Public No. 732, 77th Cong., approved October 6, 1942.
2. Public No. 861, 76th Cong., approved October 17, 1940; 54 Stat. 1185; 50 U. S. C. 540, as amended by Public No. 554, 77th Cong., approved May 14, 1942, which extended the provisions of the 1940 Act to members of the Women's Army Auxiliary Corps.
3. Public No. 103, 65th Cong., H. R. 6361, 40 Stat. 440.
4. For a study of the 1940 Act, *see* 27 A. B. A. J. 23.

and benefits accorded persons in military service under Articles I, II and III from the date of the receipt of such order to the date he reports for induction or service.

Right to Adjust Obligations. A new Section 107 was added by the amendments. It insures the right of persons affected by the Act to modify, terminate or cancel any contract, lease, or bailment or any obligation secured by mortgage, trust deed, lien, or other security in the nature of a mortgage, and to permit the repossession, retention, foreclosure, sale, forfeiture, or taking possession of property which is security for any obligation or which has been purchased or received under a contract, lease, or bailment. This may be done at any time from the receipt of orders to report for induction or service and during the period of military service. But it is required that such contracts or modification of contracts be in writing.

Article II—General Relief

There are two amendments to this article, both of which are quite important. They change the rights provided for under the terms of the obligations themselves and under the substantive law.

Exclusion of Period of Military Service from all Periods of Limitation and Redemption Periods. Section 205 has been amended to exclude the period of military service in computing all periods of limitation for bringing of any action or proceeding in any court or administrative agency of government by or against any person in military service. The 1940 Act made no provision for the exclusion of the period of military service from the periods of limitation provided for bringing of actions before administrative agencies. The amendment to this section has therefore corrected this deficiency.

The amendment to Section 205 also extends the period for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment by that part of the period of military service which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942. This amendment was necessitated by a United States Supreme Court decision[5] to the effect that a right to redeem real property was a substantive right and not a right of action, and therefore was not included in a general provision relating to the exclusion of the period of military service from periods of limitation relating to "actions."

Limitation on Interest Rates. A new Section 206 has also been added. It limits to six per cent per annum the rate of interest on "obligations or liabilities . . . incurred by a person in military service prior to his entry into such service . . . during any part of the period of military service which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942." If application is made to a court by an obligee, however, and it is shown that the ability of the obligor in military service to pay interest in excess of six per cent is not materially affected by reason of such service, the court may make such order as in its opinion may be just. The amendment defines interest so as to include "service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect to the obligation or liability."

5. *Ebert v. Poston*, 266 U. S. 548.

Article III—Rent, Installment Contracts, Mortgages Liens, Assignments, Leases

More amendments were adopted to this article than any other. Their effect is far-reaching.

Owners of Premises Relieved from Hardships Resulting from Military Service of Another. Section 300 (2) was amended by the addition of a new sentence, the effect of which is to entitle the owner of premises, who is neither in military service nor dependent upon a person in military service,, to relief from hardships resulting from the military service of another. Where a tenant of such owner, who is a dependent of a person in military service, has been granted relief by a court under Section 300 (1), which prohibits evictions and distress proceedings against dependents of those in military service except by court order, Section 300(2) permits the owner to apply to the same court for relief similar to that granted persons in military service in Sections 301, 302 and 500. The relief provided for by these sections relates to (1) the termination or recission of any installment "contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property," (2) the foreclosure of mortgages and deeds of trust, and (3) the sale and penalties for unpaid real estate taxes and special assessments.

Repossession of Property for Nonpayment of Installments. Section 301 (1) has been amended to broaden its scope and application. This section prohibits the exercise of any right or option to rescind or terminate contracts, leases and bailments for the purchase of real or personal property or the repossession of any such property where a payment has been made before the purchaser entered military service, unless an order of court is first obtained. Section 301 (1) in the 1940 Act provided that only contracts, leases and bailments entered into *prior to the date of the approval of the Act were affected.* The amendment makes the section apply to those entered into at any time *prior to the period of military service.* Section 301 (1) in the 1940 Act also applied only where a breach occurred *during the period of military service,* whereas the amendment makes this section apply also to breaches that occur *prior to military service.*

Section 301 (2) has been amended so that anyone who "attempts" as well as anyone who does resume possession of property which is subject to this section, except as provided in subsection (1), shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both.

Stay of Foreclosure and Other Court Actions. Section 302 (1) has been amended so as to broaden the application of Section 302, which gives the courts power to stay foreclosure actions commenced during the period of military service for nonpayment of any sum due or for breach of the terms of any obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property. That section is now applicable to obligations originating *prior to military service* instead of *prior to the date of the approval of the 1940 Act.*

Exercise of Power of Sale, Confession of Judgment, Seizure of Property, etc. Invalid. Section 302 (3) has also been materially broadened. It now provides that a sale, foreclosure, or seizure of property for nonpayment of any sum due under any of the above obligations, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be invalid if made after the date of the enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in Section 107, unless upon an order previously granted by the court and a return thereto made and approved by the court. The 1940 Act invalidated only an exercise of a power of sale and a confession of judgment, and then only if made *during the period of military service.*

A new subsection (4) to Section 302 was added by the amendments. It provides that any person who shall knowingly cause to be made any sale, foreclosure, or seizure of property, defined as invalid by subsection (3), *supra,* or *attempts so to do,* shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed $1,000, or both.

Appraisal of Personal Property; Payment of Appraisal Sum as Condition of Foreclosure. A new Section 303 has been added. It provides that, where a proceeding to foreclose a mortgage upon or to resume possession of personal property, or to rescind or terminate a contract for the purchase thereof, has been stayed as provided in this Act, the court may appoint three disinterested parties to appraise the property and, based upon the report of the appraisers, order such sum, if any, as may be just, paid to the person in military service or his dependent, as the case may be, as a condition of foreclosing the mortgage, resuming possession of the property, or rescinding or terminating the contract.

Termination of Leases; Liability for Rent Accruing after Induction. Section 304 is new. It is one of the most far-reaching of all of the amendments. It provides that any lease of a person who subsequently enters military service, may be terminated by notice in writing delivered to the lessor or his agent at any time following the date of the beginning of his period of military service. In the case of a lease providing for monthly payment of rent, termination does not become effective until thirty days after the first date on which the next rental payment is due after the date when such notice is delivered or mailed. In the case of all other leases, termination is effective on the last day of the month following the month in which such notice is delivered or mailed; and, in such case, any unpaid rental for a period preceding termination, must be proratably computed and any rental paid in advance for a period succeeding termination must be refunded by the lessor. Detention of personal property by the lessor is made a misdemeanor. Under the 1940 Act, the only relief afforded men called into service was a stay of rent collection proceedings.

Assigned Life Insurance Policies. Section 305 (1) is also new. It provides protection to life insurance policies of those in military service, which have been assigned prior to military service to secure payment of obligation, provided that the premiums are not due, and unpaid, by requiring a court order before any option in the assignment is exercised.

Lien for Storage of Household Goods, etc. Section 305 (2) is likewise new. It prohibits the exercise of any right to foreclose or enforce any lien for storage of household goods, furniture, or personal effects of a person in military service during such person's period of military service and for three months thereafter except upon an order previously granted by a court upon application therefor and a return thereto made and approved by the court.

Section 305 (3), which is also new, makes it a misdemeanor for anyone knowingly to take any action contrary to the provisions of Section 305, or attempt so to do. The punishment provided is imprisonment not to exceed one year or fine not to exceed $1,000, or both.

Dependents of Persons in Military Service Entitled to Benefits of Article III. Probably the most far-reaching of the 1942 amendments is that embodied in Section 306, which was also added by the 1942 amendments. This section entitles dependents of persons in military service to all the benefits provided in Article III for those in military service upon application to a court therefor, unless in the opinion of the court the ability of such dependents to comply with the terms of the obligation, contract, lease, or bailment has not been materially impaired by reason of the military service of the person upon whom the applicants are dependent.

Article IV—Insurance

This article, which relates to the insurance held by persons in military service and the guarantee of the payment of premiums thereon by the United States, has been completely revised by the 1942 amendments. The Act, as amended, not only liberalizes the insurance protection afforded those in military service, but substitutes a more workable plan for handling the governmental guarantee of premiums.

Life Insurance Policies Protected. By new Section 400, protection is given to all life insurance policies of persons in military service that meet certain requirements, subject to certain exceptions, (1) upon which a premium has been paid before the date of the approval of the 1942 amendments or not less than thirty days before the insured entered into military service, and (2) which are in force on a premium-paying basis at the time application for benefits is made under Article IV. This new section increases considerably the policies protected. For instance, under the 1940 Act, no protection was afforded policies on which there was an outstanding loan of fifty per cent or more of the loan value.

Increase in Face Value of Policies Protected. By new Section 401, the face value of the policies of any person in military or naval service upon which the United States, upon application, will guarantee the payment of premiums, has been raised from $5,000, as provided for in the 1940 Act, to $10,000. Any insured, or a person designated by him, or, in case the insured is outside the United States (excluding Alaska and the Panama Canal Zone), a beneficiary, may make application for the benefits provided under Article IV by sending the original of such application to the insurer and a copy to the Veterans' Administration.

Provision Against Lapsing or Forfeiture of Policies. By new Section 403, it is provided that "any policy found by the Administrator of Veterans' Affairs to be entitled to protection under this article shall not, subsequent to date of application, and during the period of military service of the insured or during two years after the expiration of such service, lapse or otherwise terminate or be forfeited for the nonpayment of a premium becoming due or payable, or the nonpayment of any indebtedness or interest."

Basis of Settlement Between Insurer and Beneficiary. By new Section 405, an insurer in making settlement on a policy because of a death claim or otherwise before the expiration of the period of protection provided under Article IV may deduct from the amount of insurance payable the premiums guaranteed under this article, together with interest thereon at the rate fixed in the policy for policy loans.

Guarantee of Payment of Premiums by United States and Plan of Administering Guarantee. By new Section 406, it is provided that payment of premiums and interest becoming due on a policy while protected under the provisions of Article IV, is guaranteed by the United States. If the amount so guaranteed is not paid prior to the expiration of the period of insurance protection under Article IV, the amount then due must be treated by the insurer as a policy loan on such policy, but if at the expiration of said period the cash surrender value is less than the amount then due, the policy will then cease and terminate and the United States will pay the insurer the difference between such amount and the cash surrender value.

It is further provided that the amount paid by the United States to an insurer on account of applications approved under the provisions of Article IV will become a debt due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States or as otherwise authorized by law.

The 1940 Act required a monthly accounting on all policies covered by the Act. The United States was required to deliver a Certificate of Insurance to each insurer for the net amount due as premiums each month. The amendments, by eliminating the use of certificates and substituting an outright guarantee that the United States will pay the insurer any loss with interest at the time the protection under the law ceases, simplifies the administration of Article IV.

New Section 408 retains in full force and effect the provisions of Article IV of the 1940 Act with respect to all valid applications for protection of insurance policies executed prior to the date of enactment of the 1942 amendments.

Article V—Taxes and Public Lands Taxes

Taxes. Section 500 (1) has been amended so that the prohibition against the sale of property to enforce the collection of taxes and assessments, contained in Section 500 (2), applies to taxes on personal as well as real property and taxes falling due *prior to military service* as well as *during the period of military service.*

Because of the amendment to Section 500 (2), a person in military service is also now relieved of the necessity of filing an affidavit with the tax collector to prevent a sale without court action.

Domicile of Person in Military Service for Tax Purposes. A new Section 514 has been added by the amendments. Its purpose is to prevent multiple taxation of any person in military service, or of his property or income. It provides that such person shall not be deemed to have lost a residence or domicile in any state or political subdivision thereof solely by reason of being absent therefrom in compliance with military or naval orders, and that compensation for military or naval service shall not be deemed income for services performed in a state to which he is ordered.

Article VI—Administrative Remedies

No amendments were made to this article.

Article VII—Further Relief

Application for Relief by Persons in Military Service. This article is entirely new. It affords still further relief on obligations, taxes and assessments for those in military service than that contained in the other provisions of the 1940 Act, as amended.

Section 700 (1) provides that a person may, at any time *during his period of military service or within six months thereafter,* apply to a court for relief with respect to any obligation or liability incurred by such

person prior to his period of military service or in respect to any tax or assessment whether falling due prior to or during his period of military service.

In respect to installment contracts for the purchase of real estate, or mortgage contracts, a court may, in its discretion, stay the enforcement of such obligation during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service of the applicant. This stay, however, must be subject to a plan for the payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service or from the date of application, as the case may be. The plan for payment must provide for payments during such period at such rate of interest on the unpaid balance as is prescribed in such contract for installments paid when due.

In respect to any other obligation, liability, tax or assessment, a court may stay the enforcement for a period of time equal to the period of military service. The stay, however, must be subject to a plan for payment of principal and accumulated interest in equal installments during such extended period at the rate of interest prescribed for such obligation, liability, tax or assessment.

Section 700 (2) prohibits the imposition of any fine or penalty provided for in the original obligation, liability, tax or assessment during the period that there is compliance with the terms and conditions of such stay.

THE CRAFTS OF LAW RE-VALUED*

By KARL N. LLEWELLYN
Columbia University

OUR order establishes itself at your school of law at a time and in an atmosphere which offer to men of the law more of challenge than of comfort. With the fate of the nation in the balance there is call for business men and call for medical men and call for men of the physical sciences. There is call for architects and engineers and for the clergy. There is little call for lawyers. I find no pervading appreciation that law-skills can be mobilized to serve. I find no competitive demand in the armed services for law trained men. I find no fear among civilians that if the law men go or are drafted the community must settle down to suffer for the lack of them.

I should suppose this to be a matter peculiarly apt for meditation at a gathering of men chosen from the head of the successive classes and whom one hopes to see rise to the head of the profession. For the head is the place in which men learn to look for vision and wisdom, coordination and balance, above all for rational and well advised direction of affairs. And I should suppose that to any man who had taken thought about law and the men of law and their place in our society it must have come shattering to find his profession substantially ignored when other men gather themselves to settle down to deeper business and higher business than merely living. I should suppose that in our quiet moments we had prided ourselves on embodying as does no other craft of modern life the ancient American tradition of versatility, of ability at short notice to turn to any job and do it well. I should suppose that in our soberer moments we had taken pride and felt a surge of responsibility as we remembered that our work, alone among all lines of work, represented man's full effort at ordered, balanced coordination of People, State and Nation, serving not parts or interests only, but the whole—not merely regulating or repressing, but gathering, guiding, directing the whole work of the whole national team. I should suppose that as we had watched men of law who were skilled men of law at work with men of any other line or craft, we had found our memories crowding with the instances in which grasp of the problem, wide-ranging grasp, and grasp of the men, sure-fingered grasp, and shrewd, practical invention of ways out or through or under had proved to be the work of the law-man in the group. You see it wherever a business outfit has good general counsel: one other man—be it the president, or the best vice president, or the general manager—one other man out of the whole gang, *and* the general counsel, these are the leaders. You see it when a lawyer takes over the presidency of a University—that job which stretches even a good lawyer's versatility to the snapping-point. You see it in Washington, where the general counsel of an administrative organization, if he is worth his salt *as a lawyer,* becomes a hub or the hub of policy and administration, where the better lawyers have been managing to combine so much order with forward-looking movement that you neither hear of their work nor have a chance to object to it as you struggle with the performances of men who are not themselves lawyers, and whose counsel do not happen to be good lawyers. If you, like me, have seen these things and known these things and had your quiet pride in them, it must have come shattering to you to find that we seem to be the

* Address at the installation of Coif at the University of Colorado School of Law.

only ones to whom an inkling of these things has trickled—to find that in the eyes of laymen high and low, military and civilian, our skills appear as badly worn spare tires, neither appealing nor reliable, and suited in the national need for the scrap pile to be remade into a make-shift something else. Nor do I find deep-throated crying for our vision.

Shock or no shock, the matter calls for thought from the head men of law classes and of the rising bar.

I suggest to you that we can settle on at least two reasons why men of the law are invited into cold storage or the scrap heap when their country needs them most. I suggest to you first that we have confused ourselves and so have confused the layman, about the essence of our craftsmanship. We have fooled ourselves, we have fooled our law professors, we have fooled the whole bewildered public, into the idea that the essence of our craft lies in our knowledge of the law. And knowledge of the law we do have, and we do need, but such knowledge is but the precondition of our work. Yet the idea that the essence lies in this peculiar knowledge of the law, that idea gives us a sort of standing, the standing of monopolists in a secret lore; and it may be we have discovered that the priests of any black art can make the uninitiate pay well for mystic service.

But the idea comes at a price. It comes at a price, for instance, of turning out of law school prospective lawyers who know nothing but the law, and have no simplest smattering of how to *lawyer*. It comes indeed at a price of blinding our own eyes to our own daily job, so that in the very process of counselling or of briefing a case we study chiefly *what* courts have decided, and forget *how* they go about deciding cases, and *how* they use the authorities with which they work, and how and why those authorities themselves came into existence. The horrible mark of this among the best of us was the desolate wail of the bar from coast to coast when the Supreme Court finally got around to making some sense out of the tax decisions. That caught the nation's leading lawyers short, like lambs in Wall Street. Yet the inevitability of it had been written on the face of our economy for ten prior years: the question was only just when, just how, the change would come. Had lawyers consciously been viewing their work as a *craft of doing and getting things done with* the law, instead of as a mere monopoly of knowledge of the law, those lawyers would simultaneously have been viewing appellate judging as another, and a different, as the key-craft of law; they would have been studying that key-craft and its methods, as well as its particular results; they would have been ready. Let me say it again: the essence of our craftsmanship lies in skills, and wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for *regularizing* the results, for building into controlled large-scale action such doing of things and such moving of men. Our game is essentially the game of planning and organizing management (not of running it), except that we concentrate on the areas of conflict, tension, friction, trouble, doubt—and in those areas we have the skills for working out results. We are the trouble-shooters. We find the way out and set up the method of the way, and get men persuaded to accept it, and to pick up the operation. That is the essence of our craft.

But we do not say this, even to ourselves. Why not? Does it seem too plain, too ordinary, too much like what needs no license via bar examination? I do not know. What I do know is that *because* we do not say it to ourselves we do not study our own essence as we need to, we do not train every lawyer in it, we do not have and cannot yet phrase or apply standards of minimum competence in it, we do not require entrants to qualify in it, we learn it, each one of us, only by slow unreckonable accident, happenstance or inborn artistry. What I do know further is that because we do not say it to ourselves we do not say it to others, and others even when they meet it in one of us, think it not a lawyer's peculiar craft, learned by lawyering, but think it an accidental human attribute of some particular lawyer. Does the Colorado campus know, does the state know, that Bob Stearns may have been born with vision, or may have sucked it in from wherever, but that save for the skills in men and measures which he gathered as a lawyer and by lawyering, his policies would have collapsed, instead of building? *He* knows it. But it is not as a lawyer, it is as a university president, that he has been called into the war effort to help work things out. *He* knows that. It is infinitely less as a president than as a lawyer that he is proceeding to effect his contribution. And *he* knows that. *They* don't. They never will know it, nor will nor can they draw the consequence, until such men as you first know it, then become articulate about it, then act on it. Dean King and your faculty are ahead of you, on that, although it is your own finer craft-skills which they must turn to studying, to *implement* their goal of making law school work not alone at knowledge of the law, but also at the craftsmanship that is a lawyer's pride.

That is one reason why our fellow Americans see us as useless, save as rear rank privates: they do not even know what our craft is, they do not dream of the value of the skilled law trouble-shooter in the welter of a national reorganization. There is another reason. It is a tender one. It rests upon a thing too often forgotten even by men foremost in remembering the first. For during the bouncing years of the exploitation of a Continent there seemed resources enough to take care of everybody, a boundless range of jobs to do, money to coin, and time so fleeting—and lawyers drifted like the rest along the current of swift opportunity. The then slant of thought which is now a tradition of thought is a client-wise, interest-wise, specialized and special slant of thought. Most of us still hold pretty firm to the old

idea that law should serve right and justice, and that right and justice demand to be viewed against the picture of a whole going Nation. But most of us, specialized and special, in continuing contact with particular clients or with clients of a particular class or range of interest, acquire views of right and justice, and so of the interest of the whole, which can hardly be said to rest on rounded observation, or on rounded thinkings.

Let me remind you that this is something of a modern phenomenon. A century ago the bar, even its leaders, enjoyed relatively little specialization. Sectional its thinking was, as also its views of policy; but community by community, lawyers drew business from every economic level, every line of business, every type of background, every type of person. Right and justice, as they saw it, had a rounded basis, it had a rooting in the felt interest of a whole. The easy place to see the mark of that is in the opinions of the time—Gibson, Shaw, Ruffin, Doe, Cowen, and on down the list. Technically clean work, admirably clean, but always with a conscious eye to need, to the need of the *whole* community, to *reason*, tested by the horsesense of current fact and life, to justice as measured by that kind of reason. Now this sense that law work is not right work unless it makes sense for the whole as a wise man would see the whole—this sense that law is not good law if it does not make sense—this sense I do not find strong today among the practicing profession. Its absence is unhealthy in any law; its absence is vicious, in a democracy; its absence is perilous in a democracy at war. For that great inarticulate welter pulling this way and that way which we call "the people," the folk of that welter have a deep and sure feeling about what law is for. It is for right, and it is for justice, and it is for the whole and not for any single part or party. When law is not so, something is wrong. When the work of law is not so, something is wrong. And whereas laws, many laws, may be very wrong indeed, The Law is right (and there again "the people" have a deep truth by the tail). This means, in people's eyes, that The Law must have been corrupted or abused or intricately tangled into folly by the lawyers. No wonder our skills are not perceived; they are thought bad. No wonder our skills, even where perceived, are in no great demand to win the war: men do not trust our *vision*, in their use. Technique without ideals is a menace; and that, all men know and laymen fear. The other half of the same truth which we could teach them reads: Ideals without technique are a mess. But to show what is not a mess, but a salvation, one needs to put technique to work upon ideals, with vision.

I have no belief in empty preaching. I have a very live appreciation of the problems known as rent and baby's shoes. I have no faith whatever in the accomplishment for national welfare of a lawyer who practices death by starvation, instead of practicing law. I know that clients must be got and must be served. But the cold fact is that success in practice by way of what I may sum up as bigoted legalism has been on its way out for close to twenty years. It is seventeen years since the present Chief Justice made the same point, as a point already clear. I do not mean that a good man, with luck, cannot still achieve a handsome competence along that old road, nor do I mean that such a possibility will shortly disappear—for some. I mean that it is taking better and better men, and taking more and more luck, even for those, to work that out. I mean that one major portion of "the economic plight of the bar" of which so much is heard lies in the fact that *most* of the bar are still trying to practice law along the lines of a bigoted legalism whose banners were wavering by 1920, and since, have been in full retreat.

Look at the facts—the cold ones. Before a jury you must make the jury believe your client *right*. Try facts before a court, and three times out of four or three and a half, you need the same. *Good* lawyers before an appellate court today spend over presentation of the facts, to persuade indirectly of the justice of their cause, an effort which exceeds the effort spent upon the marshalling of authorities. Mere legalistic correctness, *unaccompanied* by good sense, travels today a road as tough as that travelled by mere appeal for justice, unaccompanied by shrewd marshalling of authorities. Or take counselling. Good counsellors counsel today no longer for the maximum blood squeezage. They have discovered that that kind of counsel or of document bites back. It offends any customer who may read it. It offends a court. And a court can find ways through or under any language you can write. *Lasting relations* are built on a view of the client and the other party as in some sort of a working team, though of course one seeks for his client a somewhat extra handsome slicing of the cake. Nowhere is this clearer than in the utter change that has in ten years come over the *style* of counselling in the labor field; the bitter-ender lawyer loses case and client. The interesting thing is that the lesson there is as old as the lawyers' proverb from the rounded days; the slogan went then that one ought to know his adversary's case well enough to win it. Applied today, to counselling, that means well enough to gather in the bulk of what your client really needs, on the basis of the other party's major premises, and with a result that is a working result, a reasonable mutual satisfaction.

Indeed as one turns to any phase of that vast opening modern line of practice, of service and of earning a living, which has to do with governmental agencies, a lawyer meets not only professional opportunity, but the very lines of work the whole profession has been needing in order to recapture its vision of the whole. Each agency, well-devised or poorly devised, well-manned or ill-manned, stands for an effort to deal with some aspect of a national need, a need of the whole which in the rush of things has gotten overlooked or shoved aside.

(Continued on page 844)

IMPROVING JUDICIAL ADMINISTRATION

A Glance Backward and a Look Ahead

By ROSCOE POUND

Formerly Dean, Harvard Law School

WE have pretty much given over the juristic pessimism of the nineteenth century which expected laws and institutions to develop themselves through the inherent power of freedom or justice to realize themselves. It is no longer the fashion to preach the futility of creative legislation or of conscious juristic activity toward improvement of the administration of justice. Such kernel of truth as there was in the doctrine of the dominant historical jurisprudence of the last century grew out of certain limitations upon what may be achieved by means of law in any of its three senses. Social control in all of its forms from the beginning has met with difficulties and the highly specialized form of social control through the legal order has not been exempt from them. Other agencies of social control, household discipline, the discipline of organized religion, more or less organized morality or public opinion, and the internal discipline of groups, associations and professions, even after the adjustment of relations and ordering of conduct has come to be under the paramount authority of politically organized society, must still achieve much of the task. Even more there are limitations on achievement of the end of the legal order by means of a body of authoritative grounds of or guides to determination developed and applied by an authoritative technique. This is true whether we think of the precepts as rules of or guides to conduct or as rules of or guides to decision or, as many do today, as threats of exercise of force by state officials in case of certain items of conduct or certain situations of fact. Equally, too, there are limitations upon law in the sense of the judicial and the administrative processes. In the past, men have tried each and the legal order has swung back and forth between a judicial process according to authoritative precepts and a received technique, on the one hand, and an administrative process, according to intuition and personal discretion of a magistrate or official at the crisis of decision, on the other hand.

It has too often been assumed that one method or the other must be employed exclusively. But even when we concede that each is necessary in an effective administration of justice and seek to keep them in balance or to reach a balance between them, we are still confronted with inherent causes of dissatisfaction on the part of the public with the results.

We must not ignore the inherent causes of dissatisfaction with judicial justice according to law, that is, according to experience developed by reason and reason tried by experience, formulated in authoritative precepts. Some of these difficulties are involved in the nature of formulated precepts. Some are involved in certain tendencies of judicial administration of justice. Some are involved in juristic development of the formulated precepts.

On the whole, the most active and constant cause of dissatisfaction with law in the sense of a body of authoritative precepts has been the necessarily mechanical operation of rules and to a less degree of principles and conceptions. This is a price that has to be paid for certainty or predictability and uniformity. The mechanical operation of law may be minimized but it cannot be obviated. Rules of law are general rules. Principles are generalizations of a higher degree. Conceptions are generalized categories. Standards are generalized limits of conduct to be individualized in application. The process of making legal precepts general involves elimination of what are taken to be the immaterial elements of particular controversies. The difficulty is that the degree in which actual controversies approach the formulated types cannot be calculated with precision. In practice they approximate these types in infinite gradations. In eliminating what are regarded as immaterial features in order to reach general precepts we cannot be wholly assured of not eliminating something which will be more or less material in some individual case. We may seek to meet this difficulty by introducing a judicial dispensing power, or at the other extreme, by piling up exceptions and qualifications and provisos. If we take the former course an uncertainty which threatens the economic order or an over-wide scope for the personal equation of the magistrate, which leads to resentment of subjection of the individual to the arbitrary will of another, are the results. If we take the latter, the body of law becomes cumbrous and unworkable. Hence legal systems have in the end sought to steer a middle course between wide discretion and over minute rule-making. In doing this they cannot avoid some sacrifice of flexibility of application to particular cases, and hence will always seem more or less arbitrary and run counter to the ethical notions of many observers of the judicial process in action.

Another source of dissatisfaction is inherent in a system of formulated precepts. These precepts tend to formulate the moral ideas of the community, and being formulations of the morality or ethical custom or public opinion of the time and place cannot take form until morality and ethical custom and public opinion become fixed and settled. Nor can they change until a

change in morality and ethical custom and public opinion is complete and manifest. Hence there is an inevitable difference in rate of progress between law and morals. The law does not respond quickly to new conditions. It does not change until ill effects are felt—often not till they are felt acutely.

Moreover, the law operates to restrain individual activities in order to secure certain social interests. But men are impatient of restraint and so are forever pushing to the furthest logical limits of legal formulas, thus subjecting these formulas to a strain which the formulations of experience in other fields do not encounter.

Again, if we have a system of authoritative precepts and an authoritative technique of developing and applying them in a complex social and economic order, we must have judges trained in the system of precepts and the received technique. But there are tendencies inherent in a trained judiciary which we cannot ignore. Judicial justice easily becomes rigid. It easily becomes over-logical in carrying out principles to their extreme limits or referring cases to legal conceptions after the manner of Procrustes. It is not unlikely to seek to reduce to rule, along with those things which call for rule, those with respect to which rules are not practicable. We must pay a price for the advantages of judicial justice, as we must for the advantages of law.

To this we must add certain difficulties involved in development of the law by juristic writing and teaching. Maitland tells us that taught law is tough law, and the whole history of law shows us how slowly a taught legal tradition yields to political or economic changes. Not only is a taught legal tradition obstinate, it is not unlikely in the hands of professional practitioners and teachers to become over-abstract, over-refined, over-technical. It is likely to become "scientific" for the sake of science and not as a means toward the end of law. It is likely to get out of touch with the life it is to regulate.

The foregoing difficulties are largely beyond the reach of programs of law reform. But we must bear them in mind when the results of our reforms do not wholly measure up to our expectations.

One must hasten to add, however, that there are even more serious inherent causes of dissatisfaction with the alternative regime of adjustment of relations and regulation of conduct without law in the sense of authoritative precepts and an authoritative technique of developing and applying them.

One need not speak of the proved incompatibility of such a regime with a developed economic order. Indeed, it is a cardinal tenet of the Marxian theory that with the abolition of property there will come a disappearance of law. Law has always developed with trade and commerce, and the leading exponent of Marxian jurisprudence argued that law grew out of trade and could not exist apart therefrom. Nor is it needful to do much more than recall human resentment of subjection, actual or suspected, of one will to the arbitrary will of another. One of the curiosities of legal history is the popularity of the narrow, illiberal, ultra-individualist strict law of the earlier stage of legal development. Aristotle argued for it against a liberalized procedure. The author of the *Mirror* objected to rational trial by jury and called for the old mechanical trials. The English Commons sought in ten Parliaments of the fifteenth and sixteenth centuries to abolish equity. The Puritan opposed it. The Long Parliament came very near doing away with it. Pennsylvania and Massachusetts for a long time refused to receive it. Jefferson objected to what he called Lord Mansfield's innovations. Men turn to justice without law in periods of rapid transition. They return to justice according to law after experience of the alternative.

Here, again, we have to recognize inherent difficulties in a mode of determination and adjudication which is required by certain types of cases not admitting of rules. The law has learned to commit such cases to standards. Then, too, there are types of cases which call for a high degree of individualization in the application of legal precepts. In these cases, whether disposition is committed to judicial or to administrative tribunals, we have to guard against certain tendencies inherent in determination at discretion instead of in accord with authoritative precepts. The administrative features of judicial justice, the administration of justice in petty courts, often by lay judges, and, at any rate, left mainly to the good sense of the magistrate, and the so-called quasi-judicial determinations of administrative agencies, show the same phenomena. An obstinate tendency to act without notice to parties affected, or without hearing, or without hearing one of the parties, to make determinations injuriously affecting individual rights without a basis in evidence of rational probative force, to give effect to policies beyond or at variance with the statutes or the general law governing their action—all this may be seen in the current reports where appellate tribunals are reviewing the action of probate courts in guardianship and like cases, where personal justice in a juvenile court goes too far and has to be corrected on appeal, and in traffic courts and justice's courts where magisterial zeal or individual idiosyncracy require judicial review, no less than in the course of determination by non-judicial administrative agencies. Personal justice in traffic courts and before justices of the peace, where there is relatively little practical possibility of review is notorious. But as one goes through the reports of judicial decisions in the states with his eyes out for cases of review of administrative determination, both judicial and non-judicial, he cannot but be struck with the likeness of one-judge administrative action in inferior courts to quasi-judicial determinations of administrative agencies. Here, again, we are confronted with inherent difficulties of social control through the legal order which we can check and control but very likely cannot wholly eliminate.

What we can do, however, is to deal intelligently and thoroughly with another type of causes of dissatisfaction

with the administration of justice which is not inherent in the legal order, or in maintaining that order by means of authoritative precepts applied by an authoritative technique, or in the judicial process. These causes are chiefly historical in their origin. For the most part, they have grown out of survival of institutions and methods devised for the exigencies of administering justice in former times and under different conditions from those which obtain today. It takes long continued experience to find out how to adjust relations and order conduct through a systematic application of the force of a politically organized society. After experience has shown how best to treat certain persistent problems and what institutions and organization of agencies of justice and what procedures are best suited to a time and place, and after this experience has been well developed in detail, it not infrequently happens that social and economic changes have gone on more rapidly than is compatible with adjustment of the machinery of justice to meet them. When, as in this country in the latter part of the nineteenth century and in the present century, a body of institutions and methods has reached maturity while the type of society in which it arose has been giving way rapidly to one of another type, the resulting patchwork tinkering to meet new conditions but partially understood, can only result in general popular dissatisfaction with the administration of justice such as was so marked a generation ago.

Here is a field in which the efficacy of effort toward improvement is assured. Indeed, the American Bar Association may be justly proud of what it has achieved in this field by a generation of effort. But there is still much to be done.

To begin at the bottom, by the last quarter of the nineteenth century our system of courts had come to be archaic in three respects: (1) in its multiplicity of courts, (2) in preserving and developing an older regime of concurrent jurisdictions far beyond the exigencies of our federal polity, and (3) in the waste of judicial power which it involved. The reorganization in England in 1873 had shown the line to be taken. But it was not until the present century that we began to move cautiously in the new direction. Continual legislative amendment of the statutes governing the organization and administration of the courts was the bane of judicial administration of justice in the last century. Instead of providing an organization flexible enough to take care of new tasks as they arise and to turn its resources to new tasks as those to which they were assigned cease to require them, we went on in the primitive fashion of setting up a new court for every new task. Indeed, that fashion dies hard. The zeal of advocates of important social objectives, who see only the demands of their special projects, still calls for new independent tribunals, and administrative justice is already going over much the same course of development which we have seen in judicial organization from the Revolution to the first decade of the twentieth century. Some of the things of which I made complaint a generation ago have been remedied in the progress toward unification which has been going on with increasing momentum. The organization of the federal courts has been modernized and the administrative business of those courts has been put on a modern basis. The bad practice of throwing cases out of court, to be begun over again in case they were brought in the wrong court, has been generally given up or at least much modified. Yet there is still much to be done. There ought to be no question of jurisdiction under rigid detailed constitutional or statutory provisions. Rules of court may deal with the situation for which such provisions used to be made, and may deal with them fully and satisfactorily, if they arise between branch and branch of the same court and are subject to the superintending control of one official. Only a unified judicial system, with a responsible head and responsible heads of branches and divisions under him can insure that the work of the judiciary is well done under the conditions of today.

Especially important is the organization of the inferior courts. There has been much progress in setting up adequate municipal courts. But for the country as a whole the condition of the tribunals dealing with small causes is still far from satisfactory. If, in view of the English County Courts, it needed to be shown, municipal courts in a number of states have shown that it is perfectly feasible to administer a much higher grade of justice in inferior courts without resorting to the more expensive methods of the courts of general jurisdiction. Just now traffic courts are attracting attention. They present an acute problem of court organization. But the solution is not to set up another independent set of local petty tribunals. The sooner and further we can get away from the old justice-of-the-peace idea for small causes, the better.

No less fundamental in any program of improvement is the personnel, mode of choice, and tenure of judges. Here the utter inadaptation of ideas and methods of rural, agricultural America to urban, industrial America, and of institutions suited to a time of great distances, slow and expensive travel, and economically self-sufficient neighborhoods, when functioning in a time of elimination of distance by rapid modes of travel and of economic unification, stands out conspicuously. The political conditions of the time make the locally elected, short-term judge something very different from what he was in the days of small neighborhood bars and widespread public acquaintance with their leaders through sitting on juries and general public attendance at the local terms of courts for the trial of cases. Today it is not effective forensic exertion but newspaper publicity which attracts public attention. As it has been put, the judicial Barnum, who operates a circus court, finds the resulting publicity an insurance of renomination and election. The inferior courts, the courts from which the bulk of the population chiefly derives its impressions of judicial justice, suffer peculiarly from

modes of choice of judges which reflect the political conditions of the locality. While some progress has been made here and there in this connection, and some states have succeeded in keeping the tradition of a bench out of politics, in most jurisdictions there is little more than the beginning of a better system. Here is something calling particularly for wise planning by the bar associations or organized bar in each state. Conditions, historical, geographical, economic, and of make-up of the population, differ much in different parts of the country. Adaptation to local circumstances of some plan more in line with the tasks of the bench in the urban society of today must be studied for each jurisdiction.

Procedure has attracted chief attention for a generation, and here the most progress has been made. At first, in the formative era after the Revolution, there was a need of something better than the loose and irregular procedure which had largely obtained under a regime of lay judges and submission of all cases to juries in many of the colonies. In some of the colonies the eighteenth-century English procedure had been substantially received before the Revolution. Some of the colonies had worked out desirable modifications. But there were crudities everywhere. Hence for a time procedure was more and more made to conform to the English model. Then followed the era of legislative prescribing of detail under which, while many noteworthy reforms were effected, American civil procedure suffered for almost one hundred years and still labors in many jurisdictions. Here the beginning of wisdom is committing procedure to rules of court, and the federal statute providing for this and the federal rules mark an epoch as distinctly as the New York Code of Civil Procedure did in the middle of the last century. The achievements of the American Bar Association and organizations connected with it, and of the American Judicature Society, have been outstanding in this connection. Happily, their work is still going on, for there are many jurisdictions which have still to take the first step.

Trial procedure lags in comparison with pleading and bringing causes to the trial stage. But here, too, looking at the country as a whole, notable progress has been made in the last two decades. Many prejudices from the ideas and methods of the old rural court house and many bad practices which grew up with the rise of metropolitan cities remain to be eliminated. Yet as one reads the current reports and remembers what he used to read a generation ago, he must be greatly encouraged. It is especially gratifying to note the increased control exercised by the trial judge, returning to the common-law methods and tradition, from which for a time we grew away. In this connection the work of the bar associations in codifying professional ethics has helped much. The courts are now able to insist on adherence to canons which obviate many unfortunate features of jury trial which developed in the last century.

A generation ago, over four per cent of the reported decisions of our highest courts went off on points of appellate procedure. In three years, 1903-1906, in ten volumes of decisions of the federal Circuit Courts of Appeals, there was an average of ten cases upon appellate practice to each volume. In ten volumes of one of the series of the National Reporter system it appeared that twenty-five per cent of the decisions of the highest court and intermediate appellate courts of one state involved points of appellate procedure. All this was sheer waste. Happily, this bad condition has been remedied for the federal courts and for some states which have committed the subject to rules of court, and has been mitigated in many others. Yet I notice in the last volume of the reports of one state, reporting decisions in 1940-1941, no less than sixty-three decisions upon points of practice are indexed under "Appeal and Error." In another state, which has by no means been backward in procedural reform, the last volume of reports (1941) indexes twenty points under that heading, four of them under a sub-heading which ought to have disappeared by this time, namely, "Assignments of Error." The bad condition of procedure at the end of the last century and in the fore part of the present century had much to do with the rise of administrative justice and legislation exempting, so far as possible, the procedure of administrative agencies from judicial scrutiny. The hypertrophy of appellate procedure in too many jurisdictions is today a chief obstacle in the way of judicial review of quasi-judicial administrative determinations.

Criminal procedure has been a weak spot in American administration of justice throughout the land. But legislation committing criminal procedure in the federal courts to rules of court and the rules now being worked out by authority of the Supreme Court of the United States insure a beginning of better things.

In improvement of the substantive law, we have the notable restatements of many important departments of the law by the American Law Institute. In this field there is less to do. Where not hampered by legislative prescribing of details and imposing of hard and fast procedure, our courts have from the beginning done excellent work in the formulation and development of the substantive law. Not that there will not always be need of adapting the law found by experience developed by reason and reason tested by experience, to the continually changing life to which it must be applied. But we have here no such immediate problem, such as those presented by organization of courts, personnel, mode of choice, and tenure of the bench, and procedure. The side on which most must be done is the substantive criminal law. A great desideratum is another Joel Prentiss Bishop to do for the criminal law of today and tomorrow what he did for the criminal law of the last century. The courts need the guidance of a modern law book on this subject if their work of shaping the law is to be well done. Unfortunately, I see no signs

that our law schools are going to help us here. But Bishop was unique among the creative text writers of American law in not being a law teacher.

On many prior occasions I have urged a Ministry of Justice. This is not a proper occasion to reargue that matter. But let us not forget that it is the way to insure that our law shall not again fall into the condition to which legislative tinkering and statutory strait jackets had brought it a generation ago.

The evil that men do lives after them. The results of the mistakes they make, when laid down in authoritative statutory provisions, may plague generations to come. The ill effects of the organization of courts and codes of procedure and detailed practice acts which obtained fifty years ago live after them in the reaction from judicial justice and establishment of administrative justice which have been manifest in ever increasing connections and the tendency to set administrative justice free from the checks which experience has developed as to judicial and legislative action.

APPELLATE COURT DECISIONS*

By LAURANCE M. HYDE
Commissioner, Missouri Supreme Court

METHODS of work of appellate courts have often been described and discussed in bar association reports and in articles in bar journals and law reviews. These methods are not and should not be considered secret or confidential, although, of course, anything concerning any submitted case is very much so. In 1927, Hon. Charles Evans Hughes, after his first service on the United States Supreme Court and before he became Chief Justice, delivered a series of lectures at Columbia University, in which he fully and clearly described in detail the Court's method of work. These have since been published in a book entitled, *The Supreme Court of the United States.*

In 1924 the American Judicature Society circulated a questionnaire, "Concerning Methods of Work in Supreme Courts." It then said: "We desire to make it clear that there is no implied criticism of the courts in any of these questions. Our object is not to criticize, but to co-operate. The integrity, industry, and ability of the supreme courts are not in question. The only question is whether the experience and practice of certain courts may not be helpful to other courts." [8 J. Am. Jud. Soc. 101; for replies to questionnaire of 1924, *see* 8 J. Am. Jud. Soc. 165; 9 J. Am. Jud. Soc. 20, 49, 115, and 152; 10 J. Am. Jud. Soc. 57]. We attempted to have the broadest possible basis for our report by preparing a questionnaire and sending it to every appellate judge in the United States. We also sent copies of our questionnaires to the presidents of all bar associations represented in the House of Delegates so that they would have information as to the study we were making.

The Matter of One-Man Opinions

The principal reason for having appellate courts is to review decisions made by one man (the trial judge; on his rulings in law cases, on his decision of the whole case in equity) so that a final decision may be made which is the joint product of several minds. However, each appellate court has to determine to what extent its decisions can actually be the joint product of all of the minds of all of its judges. The term "one-man opinion," is a somewhat overworked and misconstrued expression. There is certainly a distinction to be made between one-man opinions and one-man decisions. In one sense, almost every opinion is and properly should be a one-man opinion because it is usually written in the language and method of expression of the author. Surely such individuality and originality makes for progress in the law as in anything else. The style and unusual manner of statement of such judges as Holmes and Cardozo (and many others) have been of highest value, greatly enriching the literature of the law. Criticism of one-man opinions should not be carried so far as to hinder such individuality of expression. Our study indicates much collaboration and co-operation in all courts, especially on the close and difficult questions. Nevertheless, certain methods have been found by experience to work well to bring about consideration of the views of all participating judges without unreasonable expenditure of judicial time, and to be important safeguards to make decisions a joint product.

Reasons for Differences in Methods of Appellate Courts

It is apparent that appellate courts have two important problems: first, to decide cases correctly;

*Note—This is a summary of a study made by a committee of the Section of Judicial Administration. Judge Hyde was chairman of this committee. The other members were Hon. James P. Alexander, Chief Justice, Supreme Court of Texas, Hon. William Denman, Judge, United States Circuit Court of Appeals, Ninth Circuit, Hon. Orie L. Phillips, Senior Circuit Judge, United States Circuit Court of Appeals, Tenth Circuit, and Hon. Royal A. Stone, Justice, Supreme Court of Minnesota.

second, to get the work done. Everyone will agree that the first is the most important. However, even a correct decision may not do the parties any good unless it comes in time. Therefore, an appellate court with a heavy case load per member must necessarily place the emphasis on quantity of work, and use methods which will get its work done so that it will not get behind with its docket. An appellate court which is up with its docket and has a light annual load of new cases can place more emphasis on quality and exactness of statement. Undoubtedly, overloading of work must necessarily tend toward one-man decisions, because of lack of time for consultation without getting behind with the court's work. Unquestionably, also, better opinions will be produced if the ideas and work of the author can be tested and tempered by the criticism and consultation of his associates. Thus each appellate court is constantly compelled to consider whether more time can be given to perfection of its product or whether its volume of work requires more emphasis to be placed on prompt preparation of opinions.

Another important factor, in the determination of methods to be used, is whether the court must travel from place to place to hold its sessions, or whether it has only one fixed permanent place where it always sits. Even if all sessions are at one place, methods must be different if the judges do not live there, but come together there only once or twice each month. These different situations explain to some extent the different methods of the courts, especially in such matters as formal conferences with tentative written opinions by all members before assignments, collaboration between members in preparing opinions, and holding conferences for adoption of opinions. Obviously, judges who all live in the same town and work daily in offices in the same building have many more opportunities for informal conference and co-operation than those who do their work widely separated from each other. These factors must be taken into account in considering differences in methods used. Methods which work well where the judges are constantly together might not work at all where they are widely separated.

Tenure of judges is another matter that has much influence on methods. Where tenure is secure, so that judges may be sure that appellate work will be a life career, they can have time to study and utilize the best appellate methods. However, where the turnover of personnel is frequent, as is ususally true in states closely divided politically if judges are elected on party tickets, judges are not likely to stay on the bench long enough to study and perfect appellate methods. To do the best judicial work, or even to learn the best methods for doing it, requires years of work and experience. Many judges do good work from the beginning of their service, but, as in any other work, all will learn to do better work in the hard school of experience. There is a vast waste of judicial talent in many of our states by turning men out of judicial office about as soon as they have begun to learn how to best do the job. This situation is perhaps the greatest of all handicaps to adoption of the best appellate methods.

Methods for Making Oral Argument More Effective

Modern science and invention, giving us the power-operated printing press, supplemented by the shorthand method of taking dictation, the typewriter and the dictaphone, have made it practicable and easy to present arguments and authorities in printed form, which may be read and studied in chambers in connection with the trial record. Surely the system developed in this country of printed briefs is a great advance in appellate methods. However, presentation of the case by printed briefs has some weaknesses. It tends to encourage (or at least permits) the appellant to raise too many contentions. Too often an attorney, in preparing a great many points, does not think anything through and fails to make a clear presentation of the really important matters. In print every issue has the appearance of equal importance. Arbitrary limitations on the length of briefs (by rules) are unsatisfactory. Therefore, oral argument can aid to make matters stand out in the true light of their importance. Questions by the court can perform a most important function here. Thus the oral argument has not outlived its usefulness, but when properly used can be most helpful.

The use of printed briefs does also make it possible for members of the court to know something about the facts, issues and principles of law involved before the oral argument. Certainly judges who have examined briefs and records before the case is heard can better follow the oral argument and cause it to be concentrated upon the issues concerning which the court feels the need for information. A mere oration about the case cannot aid the court very much in deciding it. Real information about the facts and the issues is very helpful. Only the judges can know the matters about which they are in doubt, and they do know this much better if they have made a study of the case prior to the argument. If, by prior study, they can think of and ask questions about matters which the attorneys might not present, then the attorneys are given an opportunity to state their views on propositions which the judges would otherwise decide solely from their own research after the argument has ended. However, we have found a definite conflict of views about the advisability of such prior investigation. It is stated that a prior study would cause the judges to have preconceived notions about the merits of the case before they heard the argument, so that they would not hear the case with completely open minds. Those who take this view say it is fairer to litigants, and their counsel, for judges to get their first information about facts and issues from counsel's oral statements. Surely, however, qualified judges do not finally decide close complicated cases under either method until they have considered and carefully studied

every viewpoint of which they can think themselves or have brought to their attention by others.

Methods Used in Preparation of Opinions

The most complete method, for insuring full investigation and consideration of every participating judge, undoubtedly is that described by Chief Justice Hughes as used in the United States Supreme Court. We have found that it is used in a number of state supreme and intermediate appellate courts. It is also used in a modified form (with three members sitting in each case) in most of the United States circuit courts of appeals. (The methods used in the Eighth and Tenth Circuits are thus described.)

The unit of work is one week during which the same three judges usually sit together. (1) At the end of each day, there is an informal discussion of the cases heard that day. This discussion has two purposes: First, to ascertain if the decision in any case is so clear that it needs no further consideration (which rarely occurs); and, second, to fix the oral argument in the minds of the judges. (2) Next, each judge independently investigates each case—reading the record and briefs—and prepares a written memorandum thereon. (3) When all three judges have prepared such memoranda, a conference is held. At this conference, each case is taken up, memoranda of the judges therein are read and there is a full discussion as to how each case shall be decided and as to the grounds for each decision. (4) The cases are then, for the first time, assigned for opinions; so as to equalize the work in writing the opinions, assignments of particular cases are made to the judge who seems to have the best and clearest grasp of a particular case (as shown by his memorandum and discussion during conference) or by his experience in that class of litigation. When the cases are assigned for opinions, the judges exchange the above conference memoranda. Thus, when a judge starts to prepare an opinion he has available his own memorandum, his notes made at conference, and the memoranda of the two other judges which they worked out before and had at the conference. With these aids, he can form the opinion along the lines of thought of all of the three judges and of the discussion at the conference. When an opinion is prepared, it is sent to the two other judges for suggestions and criticisms. The purpose of this method is to secure the independent thought and investigation of each judge. Memoranda are usually quite complete and frequently are extended discussion of every point in the case necessary to be decided. Thus, when the three judges gather for conference, each is thoroughly informed and prepared on each case and, therefore, can discuss it intelligently and fully. The result is that every decision is the product of three minds which have investigated *separately*, and thereafter, have considered *together* every point presented by counsel.

Personnel—Methods for Most Efficient Utilization

The matter of personnel is something with which courts have very little to do. They must do the work which comes to them with whatever force is available. In most states, this is fixed by constitutional provisions which are very difficult to change. In many states there are no provisions for methods of obtaining additional judges. Therefore, the court cannot substitute someone for a judge who is incapacitated temporarily or expand the court to take care of substantial increase of business. In most states, there is no administrative head to the judicial system, but each judge or each court is considered completely separate without responsibility except in its own jurisdiction. No person or court is made responsible for the efficient operation of the whole judicial system. This condition comes from court organization devised for pioneer conditions and is responsible for much of today's delay and public dissatisfaction concerning the administration of justice.

Several states have devised a means of increasing personnel by providing commissions of appeals, created by statute, which furnish additional judges for appellate courts. One method is to have the commissioners sit with the court at hearings and assign cases to them just as they are assigned to the judges. When commissioners' opinions are written they are submitted to a regular conference and those which receive the vote of a majority of the judges are adopted as the opinion of the court. They are published under the name of the author, like the judges' opinions, but each is followed by a per curiam order stating that it has been adopted as the opinion of the court and showing which of the judges concurred in it. The advantage of the commissioner system is that the same men work permanently with the court, and have no other duties to take part of their time, as would be true of trial judges used temporarily. This practically amounts to increasing the number of judges of the court.

Another handicap of many appellate courts is that there is no provision made for hearing and deciding cases with less than the whole membership participating. If every member must hear every case and participate in deciding it, obviously the court must either dispose of fewer cases or decide them with less consideration by every member than they might otherwise get. A court which has discretion to control the number of cases it hears can keep within a limit which will allow full participation by all its members. A court which must take what comes is often compelled to cut down on the amount of participation to keep up with its docket. The best solution is to provide for divisions, or for hearings of cases by three judges as is done in the United States circuit courts of appeals. Certainly it is better to obtain full consideration for a case by three judges who read briefs and records and have time for real conference discussion than to have more judges charged with the responsibility of deciding but without time for such full consideration. Provisions can be

made for control of the docket by the court en banc so that cases of great public importance can be heard only en banc and cases assigned to divisions can be brought back to banc whenever deemed advisable by the whole court. Transfer to banc, upon application of the losing party, also may be required whenever the division judges are not unanimous. One trouble with many provisions for divisions is that they are too rigid, requiring the same judges to sit always in the same divisions. In many cases, they are elected or appointed to a certain division and cannot be changed. Another handicap to the most efficient utilization of personnel, as well as efficient operation in other respects, is the custom of many courts of rotating the office of Chief Justice in periods varying from about six months to two years. No one man holds the office long enough to be responsible for efficiency. No one can have real responsible administrative authority under such circumstances. There can be no systematically sustained effort to discover defects or outmoded procedure and so improvements are not often made.

Essentials of the Appellate Process

In our questionnaire we suggested a criterion for proper appellate methods which was stated in a 1941 resolution of the Board of Governors of the California Bar Association in describing and commending the methods of the United States Circuit Court of Appeals, 9th Circuit. This contemplates a court of seven members, but one in which only three judges ordinarily sit in each case. We requested comments, suggestions, or criticisms of these stated essentials, which we summarize as follows:

(1) *The court practically abolishes terms of court by making the last day of the term the beginning of the next.*

Most appellate courts have abolished the effect of terms by remaining in session (adjournment from day to day or by some method to prevent final adjournment) from the beginning of one term to the beginning of the next, except in some instances of complete adjournment during summer months. Continuous session of appellate courts so that they can always be open to transact business surely is required under modern conditions.

(2) *The court sits in fifty of the fifty-two weeks of the year—the seven judges arranging their vacations so that this is possible.*

Many courts, particularly those in warmer summer climates, do not favor holding hearings during the warmest summer months. This is a matter of local convenience.

(3) *Cases decided on the merits are upon written opinion, thus making certain for litigants the disciplined reasoning of its judges.*

Although the problem of an ever-increasing volume of published opinions is recognized, nevertheless, most courts still use this method and think it should be done, at least in all but the most simple cases. The method is suggested of a complete memorandum for the benefit of parties, but not released for publication in reports when no new law is pronounced. [See 25 J. Am. Jud. Soc. 133; also 26 J. Am. Jud. Soc. 19 and 163.]

(4) *To study the briefs of counsel before hearings.*

Certainly oral argument can be made more helpful and effective if it can be directed to the points upon which the judges desire information. Such prior study would also seem to have possibilities for determining the cases in which time for argument could profitably be extended. In this connection it is suggested that better briefs would be helpful, particularly if the prolix generalities of the assignment of error practice were abolished and a rule similar to that used in Pennsylvania adopted; requiring a brief statement of the questions involved to be printed on the first page of the brief. [See 25 J. Am. Jud. Soc. 172; 45 Yale L. J. 287.]

(5) *To grant freely extended time to counsel for argument; and*

(6) *To give a true conference between bench and counsel in the course of the presentation of the appeal.*

Both of these relate to the oral argument. Participation of the judges in the argument by questions to indicate the matters concerning which they are in doubt undoubtedly make the oral argument of more value in the decision of the case. This is also the chief advantage of oral argument over printed argument submitted in briefs and is a most effective means of preventing one-man decisions. The principal problem is to get all the argument which would be helpful in cases where it is needed, without hearing useless argument in cases where it merely wastes time. Limitations on oral argument are mainly due to volume of cases and lack of time.

(7) *Thereafter to have, before decision, a conference (and often conferences) in chambers of three fully prepared judges.*

A conference immediately after the oral argument is used by several courts and is bound to be helpful to fix the points and issues in the minds of the judges, to determine points of agreement, and to suggest the matters as to which further study is most necessary. A conference at which anything more than a mere tentative decision is to be reached certainly requires discussion based on the independent investigation of each participating judge. This is even more effective if each judge prepares a written memorandum stating his views. Of course, there may often be some simple cases which do not require the full conference treatment and this might be determined at the preliminary conference.

(8) *To assign the case for opinion writing only after reaching a decision based upon such consideration.*

As heretofore stated, the method of the United States Supreme Court, most of the United States circuit courts of appeals and of several state courts, is to have a conference of all participating judges after they have carefully studied the briefs and records and to then

agree upon the decision to be reached before assigning it to a member of the court for preparation of the opinion. The courts which use this method deem it to be essential. Many state courts consider the rotation method of assignment preferable as the best means to equalize work.

(9) *For the careful study by the other two judges of the final form of the opinion before it is handed down.*

Even though the judges may be in full accord upon the decision to be reached, nevertheless difficult, laborious, painstaking effort is still required to write a worthwhile opinion in any close or complicated case. It is essential that the other participating judges consider carefully and criticize freely the statements made and the language used. It will also occasionally happen that the attempt to write out reasons, for the result agreed upon, will disclose that such result is incorrect. Some cases just will not write the way they first seem. Therefore, this final essential is perhaps the most essential of all in our judicial system, where opinions have the function not only to decide cases between litigants but also to furnish a guide for future action to all citizens.

It seems that lawyers want shorter opinions (except in their own cases) and judges want shorter briefs and records; lawyers want longer arguments and judges want to ask questions to shut off mere oratory and to find out the real issues; lawyers want cases decided in less time but want all judges to do more work on each case; and many of them also want every judge on courts of seven to nine members to participate in every case. The answers to our questionnaire certainly show that appellate judges are almost everywhere required to do a tremendous amount of work to keep up with their dockets. They also show that appellate courts do their work well enough to balance these conflicting elements with reasonable satisfaction to the Bar.

WAR AND THE BAR

ON the occasion of the annual meeting of the North Carolina State Bar at Raleigh, on October 23, 1942, the meeting was addressed by Colonel John D. Langston, a North Carolinian of distinguished attainments at the North Carolina bar, aide to the Governor in the Administration of the Draft during the last war and later candidate for the office of Lieutenant Governor. His subject was "War and the Bar."

He is presently the outstanding leader among lawyers in the Selective Service System still on active duty with the Army, assigned to the Washington office of Selective Service. His work there qualifies him well to speak of the participation of lawyers and particularly the organized bar in the war effort.

He refers to the service by the legal profession to the war effort as one "which is not surpassed by any profession in America." This conclusion he supports with the observation that while the spirit of individual lawyers has not changed during these last twenty-five years, the efforts of the bar are now more effectively applied by increased collective capacity made possible by the development of bar associations.

Reviewing the fine contributions made by lawyers as individuals and as members of society or citizens, the Colonel then takes up the work of lawyers as members of an organized profession. "Grand strategy" he says, "does not concern itself solely with whipping the enemy. Grand strategy is concerned with winning the war, and with setting free those forces which accomplish now and hereafter the freedoms envisaged by Washington, Jefferson, Lincoln, Wilson and Roosevelt and other great leaders in the march towards a safe and sane democracy. We have determined that by the help of God this war shall be won and the freedoms evolved from democratic thought shall be the rightful heritage of every man, woman and child in all the corners of the earth. We have come a long way in this march towards a democratic concept, which would strengthen rather than weaken our national consciousness. Paradoxical as it may seem, we become better Americans, better Nationals when we are permeated with a passionate desire that all other people of the earth shall share with us the blessings of liberty. . . . It is with feelings of pride, therefore, that I see the great American bar making its contributions in various effective ways towards both winning the war and insuring the peace. The legal profession whether in the restricted practice of the profession or in the broader political, social and economic fields has never just pawed the air. It has been moved by definite purposes. It will not countenance doing futile things."

Colonel Langston points out in referring to personal, individual service by lawyers that on September 1 there were in the Army alone over 10,000 lawyers, of whom 8,000 were officers and that there were also many in the Navy.

He tells us of the profound gratitude expressed by General Hershey for the diligent and intelligent efforts of the thousands of lawyers on Advisory Boards for Registrants, on duty as Government Appeal Agents, as members of Local Boards and as members of Appeal

Boards. This is General Hershey's answer when there are occasional complaints of error or lack of uniformity: "He points to the twenty-six million cases evaluated by these officials and inquires: 'Where has there been as good a record in any field of fact-finding since the beginning of the world?' "

But it is with the activity of the organized bar that Colonel Langston concerns himself principally and to which he devotes most of his attention in his comprehensive, effective and understanding presentation of the service the bar is seeking to render. "One reason," he says, "why the contribution of the bar has been so monumental has been the wise guidance of the American Bar Association impelling it to coordinated efforts in the national defense. . . . It would be too long a story to recount the various steps through which this coordinated effort progressed, beginning with the appointment of the American Bar Association's Committee on National Defense only a few days after the passage of the Selective Training and Service Act of September 16, 1940. If every department of Government and every national organization and every industry engaged in war production, had since that date moved as swiftly and as continuously in their respective tasks as did that committee they would have no time left for griping or belittling or other favorite pastimes of the unthinking promoters of disunity, and would give no encouragement to the organized promoters of disunity. . . . The Special Committee on National Defense of the American Bar Association appointed pursuant to a resolution of the Association, September 12, 1940, was instructed to 'cooperate with any and all governmental agencies in the matter of the participation by the American Bar Association, and by the lawyers generally in preparation for National Defense.' The selection of its chairman, Colonel Edmund Ruffin Beckwith, was most fortunate. Combined in him is that understanding of the traditions, the purpose, the intense desire of the legal profession, that gives us such pride in our collective power to establish justice and make secure our institutions. Surging through him also is a persistent yet dynamic quality of leadership. . . . The importance of this organized effort was quickly recognized by the War and Navy Departments, the Department of Justice and other departments especially concerned with coordination of defense efforts, and the Advisory Commission to the Council of National Defense promptly designated representatives to cooperate with that committee. I was fortunate in having been selected as one of the representatives to this cooperating group known as 'The Inter-Departmental Committee on Legal Affairs.' "

Colonel Langston details the preliminary organizational work of the American Bar Committee and refers to the fact that the Advisory Boards for Registrants and their associates in Selective Service consist of about 80,000 persons and are composed largely of lawyers. He goes on to say, "When there is added to this personnel approximately 6,500 Government Appeal Agents and approximately 4,000 lawyer members of Local Boards and Boards of Appeal and approximately 15,000 lawyers in the armed forces, it will be seen that of the 175,000 lawyers in the country, a very high percentage of them are directly contributing their free service in a large way to the war effort. I know of no other profession or occupation that can show such a record of voluntary uncompensated service."

High tribute is paid by Colonel Langston to the work of the American Bar Committee and particularly of its chairman, Colonel Beckwith, in the preparation of the *Manual of Law* and of the second edition of that work.

He touches further upon the coordination of war activities through the organization of state and local bar association committees and then speaks at some length of the organization of the Association's Committee on Coordination and Direction of War Effort with its ten-point program, dealing as it does with service to men in the armed forces and their dependents, cooperation with Civilian Defense, procurement of legal personnel and development of rosters of lawyers available for service, the conservation of the practice of lawyers entering the service, improvement in the administration of justice to conserve manpower, safeguarding the Bill of Rights, war problems in the field of international law, maintaining the standards of legal education and requirements for admission to the bar, developing further studies of American history and strengthening and expanding the Association's Public Information Program.

He has this to say in commenting upon the manner in which the bar has rendered service: "The most gratifying thing about these outstanding accomplishments has been that it has all been done without any great display. I may therefore be pardoned for a little internal boasting about my brethren because I am now removed, except in loving remembrance, from the field of the law with at least a possibility of permanence. But when I look over the various departments of Government—War, Navy, Department of Justice, Council of Defense, Lend-Lease Administration, Maritime Commission, War Production Board, War Manpower Commission and other departments of Government and agencies directly concerned with the war effort, and see the leadership in thought and direction being demonstrated effectively now as it was during the First World War by a profession whose average earnings are less than the mechanics'—and this without parade or playing up the profession as such, concerned only with giving the best, and getting the best for the cause only, I can get some consolation in the little rhyme:

> Many there be who put on dog
> Their world is built of sham
> It matters nothing what I have
> But mighty what I am.

Colonel Langston rightly takes pride in the manner in which the trial of the German saboteurs was conducted, in which the defense was undertaken by Colonel

Kenneth C. Royall, a former president of the North Carolina State Bar. This defense consisted of more than mere vigorous and technical efforts in the trial of the case. It represented "The mighty force of the American bar, speaking through its representative, . . . demanding that through the full accord of legal rights even to an enemy, the justice, the integrity, the righteousness of our democratic institutions, carry a message of hope and faith to all the nations of the earth—even to the hearts of our enemies. . . . What a contrast to those systems under which lives and fortunes depend upon the whim and caprice of warped mentalities. In the light of such demonstration of the security to the individual freedoms which the lawyers of this country have guarded since its founding, we may well expect to see the smaller nations of the earth look to us, to see that the same principles which protect the individual rights, expand to insure the collective rights of weaker nations. I followed closely this battle. . . . I saw the courage of the aggregate American bar, the passionate desire to maintain the high standards of the profession and to justify the law as the guardian of our liberties."

The Colonel comments upon the President's Proclamation denying the rights of the prisoners to enter civil courts and upon the courage of the representative of the bar who "dared to challenge the jurisdiction even of the Commander in Chief in the belief that where a doubt existed the defendants were entitled to have that question settled by the civil courts. And it is a tribute to both the President and the Secretary of War that, while they could not acquiesce in such apparent insubordination to the High Command, they did not have Colonel Royall and his associates court-martialed because they recognized the higher duty of the defense counsel under the court-martial manual to 'guard the interests of the accused by all honorable and legitimate means known to the law.'"

Colonel Langston speaks directly and forcefully upon the vital necessity of maintaining unity and avoiding discord among the many elements of our citizenry. "It has always been true," he said, "that those whose lives are devoted to battle for the safeguarding of individual rights, will be the first to join hands in the preservation of collective rights. Wars cannot be won through divided national leadership. It is no time for political debate. It is no time to indulge in the favorite pastime of building political fences. It is no time for settlement of debatable social problems. The time for issues has past. Jurors have been discharged. Judgment has been rendered. It is the day for Execution."

And we must lean heavily upon the bar to take the lead in the solution of these critical problems. We learn that we must avoid the danger of yielding to the temptation of adopting the very principles we seek to destroy under the delusion that they make for efficiency. Unless we are on guard, we find it increasingly easier to "surrender every vestige of democracy in the present danger, with the mental reservation that after the war is won we will go back and pick up where we left off. But democracy, once surrendered, does not swing back that way. What evolution produces it takes revolution to eradicate. Democracy, fortified by constitutional guaranties, is either right or wrong. It is either effective or non-effective. It is not a hybrid sort of thing. It does not face in two directions. . . . It is not something good for peace but bad for defense. With all its apparent slowness of motion, it develops speed when crises come, which totalitarian ideals cannot match. Slaves move slowly except under constant lashings. . . . But in the recognized essential channels the individual moves as a free man,—not as a slave. . . . Mark my words, if we ever accept the Nazi methods as the best ways to move our war effort, we will be sold on the methods that the principles motivating them will become a part of our national consciousness. The preservation of the democratic way of life is one of the fundamental things that the lawyers of the country have tirelessly fought to preserve. . . . The American lawyer in his individual, social and organized capacity has always stood in the path of those who would break the faith with those who first erected the pillars of our government. . . . He will be the last American to surrender to the trends which have already brought misery and chaos to those who prefer to be servants to masters."

Does the Bar of today know that the learned Justice who wrote the opinion in *Swift v. Tyson* indulged in the resort to poetry?

JOSEPH STORY

[1779-1845]

Whene'er you speak, remember every cause
  Stands not on eloquence, but stands on laws;
Pregnant in matter, in expression brief,
  Let every sentence stand with bold relief;
On trifling points not time nor talents waste,
  A sad offence to learning and to taste;
Nor deal with pompous phrase, nor e'er suppose
  Poetic flights belong to reasoning prose.

Advice to Young Lawyers, Stanza 1.

WINFIELD SCOTT—LAWYER AND SOLDIER OF THE REPUBLIC

By GEORGE R. FARNUM
Of Boston
Former Assistant Attorney General of the United States

AT the moment on June 13, 1786, that Winfield Scott first saw the light of day on the family plantation near Petersburg, Virginia, Mars was assuredly in strong ascendency in the conjunction of the planets. The sequel was not to belie the astrological signs. For that matter, the inherited blood of the warrior flowed in his veins. His Scotch paternal grandfather had fought with the Pretender on the ill-fated field of Culloden, and his father he described as "a gallant lieutenant and captain in the Revolutionary army."

His school and college days, he asserted, "were marked by no extraordinary success and no particular failure," adding, "There was no want of apprehension; but the charms of idleness or pleasure often prevailed over the pride of acquisition." To a Quaker preceptor he avowed an indebtedness for his hard efforts "to curb my passions and to mould my character to usefulness and virtue." Of the school he attended just prior to entering William and Mary College he said that "as too much was attempted within a limited time, by republican short cuts to knowledge, it is feared that all who entered sciolists, left . . . without the ballast of learning."

That ancestor who had fled to America after the affair at Culloden and who brought with him a "good stock of Scotch jurisprudence," as his grandson put it, mastered the common law and, setting himself up as a lawyer, achieved some considerable success in that profession. Possibly influenced by family example and no doubt by the thought, as he expressed it, that the bar was looked up to, not only as a profession but "at the same time, the usual road to political achievement," Scott selected among his studies at William and Mary the common law as well as civil and international law. Upon quitting college he entered the Petersburg law office of David Robinson, whom he characterized as "a very learned scholar and barrister originally imported from Scotland, as a tutor, by my grandfather."

He had hardly ridden his first circuit, however, when off to Richmond he rushed to witness the trial of Aaron Burr for high treason. The impression that Burr made upon him he thus described a half century later, "There he stood, in the hands of power, on the brink of danger, as composed, as immovable, as one of Canova's living marbles." To the keen youth with a talent for appraising character, the actors in that historic imbroglio were a subject of engrossing study. In William Wirt, the brilliant advocate who carried the burden of the unsuccessful prosecution, he observed that ability "when it was required to call back fugitive attention, in order to another march in argument" to "soar, for the moment, high above his subject, and by bursts of rhetoric and fancy captivate all hearers," adding, "These quickening passages in his oratory will ever command the admiration of the young; nor can age always find the heart to condemn them." But with all the high drama "the interest would have been less than half," he concluded, "but that the majesty of the law was . . . nobly represented and sustained by John Marshall, Chief Justice of the United States [who presided]. He was the master spirit of the scene." Years later, at the home of Van Buren, Burr recalled observing Scott on the opening day of the trial, standing "on the lock of the door above the crowd."

Fired by the excitement that followed the news of the disastrous duel between the British frigate *Leopard* and the United States frigate *Chesapeake*, Scott forthwith locked his office and volunteered as a cavalryman to help enforce Jefferson's proclamation closing American harbors and rivers to British war craft. After participating in the capture of the crew of a small British boat that defied the interdict, and being officially admonished to "Take care not to do it again," the excitement subsided and the trooper was out of martial employment. As he summed up the adventure, "The young soldier had heard the bugle and the drum. It was the music that awoke ambition. But the new occupation was gone. He had to fall back on his original profession." After this taste of military life the law doubtless seemed a tame anticlimax. Encouraged by a bill to increase the military establishment, "the would-be soldier," as he called himself, sought and, after an interval during which he described himself as "the postponed soldier," received a commission as captain of light artillery. He was now embarked on the career he was destined to follow for half a century.

Within a couple of years the headstrong and blunt-spoken young officer was court martialed for accusing his superior, General Wilkinson, of complicity in the intrigues of Burr, and suspended. A year later, however, he was back in active service, and at the opening of hostilities with the British, was detailed to the Canadian border and promoted to the rank of lieutenant colonel. His situation, as he put it, "with a hot war before me, seemed to leave nothing desired but the continued favor of Providence." In the disastrous affair at Queenstown, the American troops were repulsed and Scott taken prisoner. A year later he was exchanged and raised to the rank of colonel. The following year, as brigadier general, he helped to restore the prestige of American arms

at the battles of Chippewa and Lundy's Lane. In the latter engagement he was twice wounded.

Following the war he was elevated to the rank of major general, after having declined the office of Secretary of War. In 1841 he was elevated to the command of the army.

Upon the outbreak of the war with Mexico, Scott assumed active command in the field and led the expedition that captured Vera Cruz and valiantly fought its way to Mexico City and the storied Halls of Montezuma. Of that achievement his latest biographer, Major Elliott, said, "In my mind's eye I can now envisage Winfield Scott, sitting indomitably at the gates of the Valley of Mexico, while whole brigades of his short-term soldiers departed for home, leaving him only a gallant handful with which to 'conquer a peace' for the coldly hostile Mr. Polk. I wonder if even Napoleon, or Wellington, or Marlborough, under the circumstances, could have matched the inspired genius that Scott displayed."

With his expedition were many young officers who were destined to be heard from in future days. Among these were Robert E. Lee, Joseph E. Johnston, Thomas J. Jackson, P. G. T. Beauregard, Gustavus W. Smith, and J. Bankhead Magruder, future soldiers of the Confederacy; Ulysses S. Grant, Joseph Hooker, George B. McClellan and George Gordon Meade, future commanders of the Union armies.

When the war was won and Scott was under fire and relieved of his command, Lee, while deploring "the dissension in camp . . . [which] clouded a bright campaign," was to write, "The great cause of our success was in our leader. It was his stout heart that cast us on the shore of Vera Cruz; his bold self-reliance that forced us through the pass of Cerro Gordo; his indomitable courage that, amid all the doubts and difficulties that surrounded us at Puebla, pressed us forward to this capital, and finally brought us within its gates."

Three times Scott, who professed Whig principles, aspired to the presidency. In 1839 and 1848 he failed to receive the nomination. He was more successful in 1852 but in the ensuing election sustained what he described as his "greatest humiliation in politics," carrying but four states, though the popular vote was close. The election marked the virtual end of the Whig party. The stoical spirit in which Scott took his defeat inspired Greeley to write in the *Tribune,* "His proud form was never more erect, nor his eagle eye brighter than it is today. He stands alone amid the wreck—grand and unconcerned, like a lighthouse after a dreadful storm."

Scott was a great hulk of a man of towering height. A letter to a hotel management is still preserved wherein he asks for "a bed at least 6 feet 6 inches in length or one without a footboard." Throughout his life he was ruled by an inordinate love of display. Of his lack of reticence Grant recorded in his autobiography that Scott was "not averse to speaking of himself,—often in the third person,—and he could bestow praise upon the person he was talking about without the least embarrassment." The impression he made on a certain Virginian politician was summed up in the exclamation, "What a wonderful mixture of gasconade, ostentation, fuss, feathers, bluster," though he added in all justice, "and genuine soldierly talent and courage." "Old Fuss and Feathers" he remained to his countrymen, though the nickname was applied in no unkindly spirit.

Though worn and enfeebled by the long and strenuous years, the fire still burned hotly in the breast of the old soldier as the ugly clouds of the approaching rebellion began to cast their ominous shadows over the land. He had asked men and guns of Buchanan to strengthen the southern forts and had been curtly rebuffed. Now he impatiently waited for Lincoln to take the helm, asking anxiously "Is he a *firm* man?" Concern being expressed about the congressional count of the electoral votes, he thundered that any man who attempted to interfere with the proceedings "should be lashed to the muzzle of a twelve-pounder and fired out of the window of the Capitol," adding, "I would manure the hills of Arlington with the fragments of his body, were he a senator or chief magistrate of my native state! It is my duty to suppress insurrection—my duty!" Staunch old Fuss and Feathers!

Bull Run was fought and in the aftermath George B. McClellan came to Washington to take command of the Army of the Potomac. There was a day long before in the hills of Mexico when the word of Scott was law unto McClellan. But the times had changed. The relations between them quickly came to a crisis. Scott spoke, "You were called here by my advice. The times require vigilance and activity. I am not active and never shall be again. When I proposed that you should come here to aid, not supersede me, you had my friendship and confidence. You still have my confidence." The following month Scott was retired at his own request, and McClellan unfeelingly wrote to his wife, "It may be that at some distant day I, too, shall totter away from Washington, a worn out soldier, with naught to do but make my peace with God."

In the five years that remained to him, he wrote his autobiography, a copy of which he presented to Grant with the inscription, "From the oldest to the greatest General." Lee, to whom it must have recalled many memories of bygone days, reviewed it with the comment that, "The General, of course, stands out prominently, and does not hide his light under a bushel, but he appears the bold, sagacious, truthful man he is."

Scott died at West Point on May 29, 1866. In a message to Congress, Lincoln declared, "During his long life the nation has not been unmindful of his merit; yet, in calling to mind how faithfully, ably and brilliantly he has served his country . . . I cannot but think we are still his debtors." Even at this day, over three-quarters of a century after his death, it remains true that we are still his debtors.

THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES

THE twenty-first annual meeting of the Judicial Conference of Senior Circuit Judges was convened in Washington by the Chief Justice of the United States on September 29, 1942 and continued through October 2.

Statement of the Attorney General

In accordance with custom the Attorney General appeared before the Conference at the opening of the first session and spoke of various matters of mutual interest to the courts and the Department of Justice. The Attorney General's address is summarized in the report of the Conference issued by the Chief Justice as follows:

> The Attorney General addressed the Conference upon various matters of current interest in the work of the courts. He emphasized the importance of filling judicial vacancies promptly if the courts are to perform their duties with dispatch; he called attention to problems arising within the Department of Justice as a result of its rapid growth during the past three years; he stressed the desirability of the courts' taking appropriate measures to expedite hearings and appeals in cases where prompt decision is of immediate concern to the conduct of the war; and he suggested the need of continuing or adjourning certain types of cases whose preparation and presentation would absorb too much time of army, navy, or civilian personnel essential in war work, or might disclose valuable information to the enemy.
>
> The Attorney General suggested that federal judges might in appropriate cases undertake to render special services in connection with the war, outside the scope of their judicial duties and consistent with them. He stated that in his opinion a judge who enters the armed forces as an officer, and accepts the salary attached to the commission, must, under the provisions of 5 U. S. C. § 62, be deemed automatically to surrender his judicial office; and he urged that any federal judge inclined to resign in order to undertake active military duty should weigh the importance of his present work and consider carefully whether he should abandon it.
>
> The Attorney General also referred to problems arising out of the performance of the functions of United States commissioners, and the status of bailiffs in the federal courts. He urged the speedy adoption of the pending court reporter bill, and endorsed the recommendations of the report of the Conference's committee on punishment for crime, and those of the committee on standards of qualifications of probation officers. He suggested that the Conference appoint committees to study the prevailing practice of imprisonment of defendants in criminal cases for the failure to pay their fines, and the treatment accorded to insane defendants charged with crime in the federal courts. He also stressed the importance of conducting proceedings in naturalization cases in a more dignified manner than is generally the case at present, and urged that all district courts should regularly entertain petitions for naturalization.

Survey of the Judicial Business

Following the address of the Attorney General the Judicial Conference gave attention to the first function for which it was created, namely to survey the trends in the calendars in the different circuits and consider what might be done to expedite the dispatch of the judicial business. The Conference noted that in general arrearages had been considerably reduced, and commented upon the practice followed in reference to the assignment of judges who had some time to spare above what was required by the work of their own districts to assist courts of other districts in which the dockets were congested. In this connection the Conference recorded its opposition to all proposals to place in the hands of the senior district judge of any district an unqualified veto upon the assignment of an outside judge to his district. It was declared to be the sense of the Conference "that a wholly adequate safeguard against the undue assignment of outside judges to sit in district courts would be afforded by legislation requiring the consent of the circuit council to the assignment whenever an objection is made by the senior district judge." The Conference was of the opinion that after all had been done that could be done to reenforce from the outside, courts in which there was congestion there was need for some additional judges: one circuit judge in each of the Fifth and Seventh Circuits, and an additional district judge in each of the following districts: New Jersey, Eastern Pennsylvania, Northern Alabama, and Eastern Missouri. The Conference recommended legislation to this end.

The Estimates for the 1944 Appropriations

In connection with its function of passing upon the estimates for the courts for the fiscal year 1944 prepared by the Director of the Administrative Office of the United States Courts, the Conference made two important decisions in reference to the supporting personnel of the courts: first, following the address by Associate Justice Justin Miller of the United States Court of Appeals for the District of Columbia, who urged that the salaries of secretaries and law clerks to judges, also of the court librarians, were far from commensurate with the nature of their duties and below what was paid for similar service in the executive department of the government, the Conference authorized the appointment of a committee "to make a survey, with the aid of the Director, of the salary scale of law clerks, secretaries and librarians, and also of probation officers, clerks' office employees and other supporting personnel of the federal courts, and to that end, with the cooperation of the Director, to seek the aid and advice of the Civil Service Commission, and to report its recommendations to the Conference at its early convenience." The committee has been appointed and its study will be one of the

principal projects of the Conference during the coming year.

Second, the Conference was emphatically of the opinion that the present system, under which the number of law clerks for district judges is limited to three to a circuit to be allotted among the district judges by the senior circuit judge of the circuit, unduly hampers the judges and that the efficiency of the district courts would be increased by providing for a law clerk for every district judge who in the opinion of the senior circuit judge of the circuit needs this assistance. It is also considered that such a policy would in the long run be economical by permitting the energies of the judges to be used to the best advantage. The Conference requested its members to ascertain how many district judges in their respective circuits desired a law clerk and to inform the Director as a basis for his estimate. This was done and pursuant to the replies received the Director has included in the estimate for 1944 provision for 81 additional law clerks for district judges, or a total of 114 as compared with 33, three to a circuit under the present appropriation.

Legislation

More and more attention is being given by the Judicial Conference at its annual meetings to legislation affecting the courts, both legislation recommended and legislation opposed. At the recent meeting the Conference had the benefit of the views on a number of proposed measures of the Attorney General whose statement has been referred to. Also following a practice begun last year the Conference had before it at one of its sessions Senator Frederick Van Nuys, Chairman of the Senate Judiciary Committee, and Senator Joseph C. O'Mahoney, one of the members of that Committee, and Representative Hatton W. Sumners, Chairman of the Judiciary Committee of the House of Representatives, and views on a number of measures pertaining to the courts were exchanged among members of the Conference and these representatives of the Congress.

The Indeterminate Sentence Bill

The Conference in 1940 endorsed the so-called indeterminate sentence bill for the federal courts, providing that in any case in which a court imposed a sentence of imprisonment for an offense punishable by imprisonment for a term exceeding one year, the sentence should be for the maximum term fixed by law, and the definite term to be served should thereafter be determined by a Board of Indeterminate Sentence and Parole, an executive agency, upon the basis of all available information, including reports of officers of the institution in which the prisoner might be confined. In response to objections to this measure voiced at a number of circuit conferences in 1941, the Judicial Conference in that year authorized the appointment of a committee, of which Circuit Judge John J. Parker of North Carolina was chairman, to give the problem of sentences in the federal courts further study. The committee submitted a report and recommendations at the recent meeting which the Conference approved.

The report retained the provision of the previous bill that initially offenders sentenced in the federal courts to imprisonment for more than one year should be sentenced to imprisonment generally which would have the effect of a sentence for the maximum term. But the committee recommended that the opinion of the Board of Corrections, based upon the study of the prisoner in the institution following the initial sentence, should be only advisory to the judge and not controlling; that this opinion as a recommendation should be given to the judge, who in the light of it and in the light of his own knowledge gained at the trial and from any other available sources such as the pre-sentence report of the probation officer, should consider the sentence to be imposed and finally determine it. The change in the plan while designed to give to the judge the fullest information possible bearing upon the problem nevertheless left the final determination in him as a judicial function.

Aside from this part of the bill intended for the more serious offenders, the bill contained provisions following, although with considerable modification, the Youth Authority Act proposed by the American Law Institute, providing for the commitment to a Youth Authority Division of the Board of Corrections of offenders under twenty-four years of age whom the judge in his discretion might consider promising subjects for rehabilitation. The bill contemplates that treatment specially designed to fit the needs of the individual offender, stressing vocational training and opportunities for character building somewhat along the lines of the Borstal System in England, will be followed. The report further recommends the use of prison camps, farms and other institutions of minimum or medium security instead of jails and prisons for offenders sentenced to short terms for relatively minor offenses. It finally provides for a period of parole of not less than two years in all cases following release from prison where the sentence is for more than one year. It provides for waiver of indictment and jury trial so that persons accused of crime may not be held in jail needlessly pending trial.

The Conference approved the report of the committee unanimously except that Judge Kimbrough Stone of the Eighth Circuit recorded his objection to that part of the report recommending a method of sentence for offenders sentenced to imprisonment of more than one year.

The Court Reporter Bill

The Conference in 1941 recommended a bill for official court reporters of the district courts under which the proceedings in every court would be recorded by official reporters appointed by the court and compensated for attendance and the taking of stenographic notes by salaries and for the furnishing of transcripts to parties by fees, at rates prescribed by the respective courts subject to the approval of the Conference. Some features of the bill

recommended in 1941 had brought objections; particularly the provisions that in the discretion of any court upon the approval of the Conference the court reporter might be engaged by contract upon the basis of competitive bidding, that the court reporter should furnish without charge transcript in civil cases for appeals by poor persons, and the provision that all private parties to civil cases should pay an additional item of $5 for costs to go toward defraying the expense of reporting. At the recent meeting the committee which had proposed the original bill recommended that the provision for the letting of court reporting by contract be eliminated, that in all cases in which the reporter might be directed by the court to furnish transcript without charge either for the use of the court or for the use of parties unable to pay for reporting, the cost should be borne by the United States and that the reporting charge of $5 against private litigants should be dropped. The Conference was informed that the bill as revised, containing the changes mentioned and a few others relatively minor, met the approval of court reporter organizations which had opposed the original proposal and also met the approval of the Bureau of the Budget. The Conference recommended the enactment of the revised bill.

Miscellaneous Legislative Recommendations

The Conference recommended a number of other legislative proposals. It recommended the enactment of a bill (H.R. 6628) to authorize the establishment of a public defender system with an amendment to provide for the services of a public defender in habeas corpus cases as well as criminal cases in which the petitioner is proceeding as a poor person. The Conference withdrew its recommendation of last year that in districts where no public defender system has been established the trial court be authorized to compensate, in a limited amount, attorneys especially appointed to represent indigent defendants.

The Conference approved the recommendation of a committee that legislation be enacted to free from civil disabilities probationers who have been found by the court to have met the condition of their probation.

It recommended legislation to harmonize the present varying provisions of different statutes for selecting specially constituted district courts of three judges in cases requiring such courts, and proposed the adoption of a uniform plan for such courts under which the senior circuit judge of the circuit should name the associates to sit with the district judge.

The Conference proposed amendments of the statutes governing court fees and costs in the district courts and the circuit courts of appeals so as to replace in general separate items for the different services of the clerks with a flat fee in each case. This would greatly simplify the accounting and it is considered would accomplish substantially the same result with much less labor.

Standards of Qualifications of Probation Officers

Action which may be as important as much legislation was taken by the Conference in reference to the standards of qualifications of probation officers in the federal courts. These officers are appointed by the judges of the district courts in which they function. The Conference has, however, for some time been solicitous about the qualifications of federal probation officers and has not hesitated to exert its influence in favor of the appointment of officers with high qualifications. In 1940 the Conference adopted a general declaration "that in view of the responsibility and volume of their work, probation officers should be appointed solely on the basis of merit without regard to political considerations; and that training, experience, and traits of character appropriate to the specialized work of a probation officer should in every instance be deemed essential qualifications." The Conference last year appointed a committee to consider whether it would be advisable to make a more specific statement of qualifications and recommend them for the guidance of the district courts. The committee, of which Circuit Judge Calvert Magruder of Massachusetts was chairman, brought in a report proposing that the Conference recommend to the district courts that in all future appointments of probation officers the appointee should be required to possess certain qualifications, and the Conference adopted the report. The qualifications recommended are as follows:

(1) Exemplary character.

(2) Good health and vigor.

(3) An age at the time of appointment within the range of 24 to 45 years inclusive.

(4) A liberal education of not less than collegiate grade, evidenced by a bachelor's degree (B.A. or B.S.) from a college of recognized standing, or its equivalent.

(5) Experience in personnel work for the welfare of others of not less than two years, or two years of specific training for welfare work (a) in a school of social service of recognized standing, or (b) in a professional course of a college or university of recognized standing.

The Conference also recommended to the district courts that future appointments of probation officers should be for a probationary period of six months, the appointment to become effective at the end of that period if the service was deemed satisfactory. It called the attention of the district courts to the availability of the Administrative Office "for the service of analyzing the qualifications of applicants for appointment with a view to determining whether such qualifications measure up to the recommended standards, and for the service of conducting competitive examinations, if desired by the court."

Provision for Committee Study in the Coming Year

An indication of the scope and variety of the interests of the Conference in progressive modification of the judicial organization is afford-

ed by the new committees authorized to make studies during the coming year. Reference has been made to the projected studies by committees of the salaries of the supporting personnel of the courts, and of the matter of law clerks for district judges. Other committees were provided for in reference to United States commissioners, a uniform time for appeals in civil cases from the district courts to the circuit courts of appeals, the method of review on appeal of orders of the Interstate Commerce Commission and other administrative agencies, now reviewable by three-judge district courts with appeal as of right to the Supreme Court, the administration of library funds of certain of the courts of appeals derived from payments made by lawyers on their admission to practice before the courts, the bankruptcy administration, the status, compensation and method of appointment of bailiffs in the federal courts, the procedure on applications for habeas corpus in the federal courts, the law and practice of imprisonment for failure to pay fines in criminal cases, and the treatment accorded by the federal courts to insane persons charged with crime. A number of committees previously appointed were continued in order to finish their work or aid in promoting the enactment of legislation recommended.

The Practice of Law Before Federal Judges by Their Near Relatives

The Conference noted that from time to time complaint had been made of the fact that near relatives of federal judges had appeared before them as counsel in pending cases. While recognizing that in many instances this may have involved no impropriety, either of judge or of counsel, the Conference considered it desirable to eliminate all possible occasion for criticism. Accordingly it adopted the following resolution:

> That it is the sense of the Conference that federal judges should avoid sitting in cases in which their near relatives are of counsel, as contrary to the spirit of Canon XIII of the Canons of Ethics of the American Bar Association, and the Conference urges the circuit councils to inquire whether such a practice exists in their respective circuits, and if so to take appropriate action.

Naturalization Proceedings

The Conference stressed the desirability of dignifying the proceedings for the naturalization of citizens, and adopted the following resolution:

> That all federal judges be requested to aid in whatever manner possible in carrying out the Joint Resolution of Congress of May 3, 1940, 54 Stat. 178, and in enhancing the dignity of all stages of the naturalization proceeding.

Special Committee on Law Lists

CANONS 27 and 43 of the Canons of Professional Ethics of the American Bar Association apply to cards of lawyers in law lists. At the recent meeting of the House of Delegates, August 27, amendments were made to these Canons. Amendments were also made to the Rules and Standards as to Law Lists. For the information of the general membership we quote Canons 27 and 43 and the Rules and Standards as to Law Lists as they presently read:

Canon 27

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment, such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the bar; schools attended, with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; the fact of listings in other reputable law lists; and, with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Special Committee on Law Lists may be treated as evidence that such list is reputable.

Canon 43

It is improper for a lawyer to permit his name to be published in a law list the conduct, management or contents of which are calculated or likely to deceive or injure the public or the profession, or to lower the dignity or standing of the profession.

Rules and Standards as to Law Lists

The Rules and Standards as to Law Lists, adopted by the House of Delegates of the American Bar Association September 30, 1937, were

amended by the House of Delegates October 2, 1941, and August 27, 1942, so as to read as follows:

Special Committee on Law Lists:

That the Special Committee on Law Lists be authorized and directed to

(a) procure information regarding Law Lists and from time to time advise members of the Association thereof;

(b) recommend to the Association for adoption from time to time such standards or rules, and amendments thereof, for Law Lists as may seem in the interest of the public;

(c) adopt, and from time to time amend, such reasonable rules and regulations for the conduct of its authorized activities as it may find desirable;

(d) endeavor to protect the public and members of the profession from dishonest, fraudulent or unworthy conduct of persons who represent, or claim to represent, Law Lists;

(e) cooperate with law enforcement officers and others interested in the censure or punishment of such dishonest, fraudulent or unworthy conduct;

(f) investigate annually at the expense of publishers of Law Lists which shall request the Committee to do so, whether such publishers respectively are complying with the provisions of the Rules and Standards as to Law Lists;

(g) issue an annual certificate of compliance to the publisher of any Law List which the Committee, upon such investigation, finds has complied with the Rules and Standards as to Law Lists of the Association and the regulations of the Committee; and revoke, conditionally or otherwise, the certificate issued to the publisher of any such Law List if the Committee finds that the publisher thereof, after receiving such certificate has violated any of such rules, standards or regulations;

(h) take such action as it may deem advisable to cause the issuance or revocation of a certificate to be made known to the members of the Association.

Rules and Standards as to Law Lists:

That the following Rules and Standards, and each of them, be adopted as and for Law Lists which request a certificate of compliance:

1. Every list of attorneys at law, legal directory or other instrumentality maintained or published primarily for the purpose of circulating or presenting the name or names of any attorney or attorneys at law as probably available for professional employment, shall be deemed a Law List.

2. The purchase or use of a Law List, the publisher of which has a certificate of compliance may be recommended to attorneys at law, or laymen, by its issuer, only on the basis of the circulation, physical makeup and accuracy thereof, and the extent to which lawyers listed therein have been investigated. Efforts by the issuer of a Law List to otherwise secure employment for any attorney listed therein, or presented thereby, shall be deemed ground for not issuing a certificate of compliance, or for the withdrawal of the certificate if it has already been issued.

3. No certificate of compliance shall be issued to the publisher of any Law List or continue unrevoked

(a) if, in connection with the preparation, publication, distribution or presentation thereof, the issuer does, causes, permits to be done, encourages or participates in the doing of, any act or thing which, directly or indirectly, violates the Canons of Ethics of this Association, or which constitutes the unlawful practice of the law;

(b) which shall be conducted upon a basis which does not tend to promote the public interest, or which employs a practice not in accord with a high standard of business conduct;

(c) or if the price for representation, or listing therein, is not uniform within reasonably prescribed areas;

(d) or if any obligation is assumed by either user or attorney, to employ, exclusively or preferentially, in the forwarding, receiving or exchange of legal business, the attorneys listed therein;

(e) or if in the physical makeup thereof, preferential prominence shall be given to the name of any attorney or attorneys listed therein, by different size or character of type, underscoring or other methods employed by printers for emphasis or to attract attention; but the foregoing shall not prohibit the publication in the geographical section of a Law List of such professional card as the Canons permit or of a reference there to such card in another section of the book;

(f) or if the issuer thereof shall endeavor to direct or control, the professional activities of any attorney listed therein or presented thereby;

(g) or if such Law List shall be published or issued as a part of any professional, commercial, trade or business publication or journal;

(h) or if the issuer thereof shall neglect or refuse to promptly and fully (a) notify the Association through the Committee, in writing, of any payment or payments made by such issuer, or by an indemnitor, upon claims against a listed attorney, or (b) to cooperate, at the request of the Association, through the Committee, in the investigation, ascertainment and proof of the facts of such claims.

4. The publisher of a Law List which has received a certificate of compliance from the Committee may rate its listees in a manner not disapproved of by the Committee.

5. The Committee shall make and promulgate such regulations as may be necessary to administer these rules and standards.

Campbell-Broughton, Inc., 140 Nassau Street, New York City, publisher of Campbell's List received from the Special Committee on Law Lists of the American Bar Association, on August 27, 1942, a Certificate of Compliance with the Rules and Standards as to Law Lists, as to the 1942 edition of said list.

THE Publishers of the law lists and legal directories listed below have received from the Special Committee on Law Lists of the American Bar Association, as to the list of lawyers' names in their 1943 editions, a Certificate of Compliance with the Rules and Standards as to Law Lists.

Commercial Law Lists

A. C. A. LIST, Associated Commercial Attorneys List, 92 Liberty Street, New York City

AMERICAN LAWYERS QUARTERLY, The American Lawyers Company, N. B. C. Building, Cleveland, Ohio

ATTORNEYS LIST, U. S. Fidelity & Guaranty Company, Redwood & Calvert Streets, Baltimore, Maryland

B. A. LAW LIST, The B. A. Law List Company, Plankinton Building, Milwaukee, Wisconsin

CLEARING HOUSE QUARTERLY, Attorneys National Clearing House, Fawkes Building, Minneapolis, Minnesota

THE COLUMBIA LIST, The Columbia Directory Company, 320 Broadway, New York City

THE COMMERCIAL BAR, The Commercial Bar, Inc., 521 Fifth Avenue, New York City

C-R-C ATTORNEY DIRECTORY, The C-R-C Law List Company, Inc., 50 Church Street, New York City

FORWARDERS LIST OF ATTORNEYS, Forwarders List Company, Inc., 38 South Dearborn Street, Chicago, Illinois

THE GENERAL BAR, The General Bar, Inc., 36 West 44th Street, New York City

INTERNATIONAL LAWYERS LAW LIST, International Lawyers Company, R. K. O. Building, New York City

THE MERCANTILE ADJUSTER, The Mercantile Adjuster Publishing Company, 10 South La Salle Street, Chicago, Illinois

THE NATIONAL LIST, The National List, Inc., 75 West Street, New York City

RAND MCNALLY LIST OF BANK RECOMMENDED ATTORNEYS, Rand McNally & Company, 536 South Clark Street, Chicago, Illinois

THE UNITED LAW LIST, The United Law List Company, Inc., 280 Broadway, New York City

WILBER DIRECTORY OF ATTORNEYS AND BANKS, Wilber Law List Company, 299 Broadway, New York City

WRIGHT-HOLMES LAW LIST, Wright-Holmes Corporation, 225 West 34th Street, New York City

ZONE LAW LIST, Zone Law List Publishing Company, Inc., Louderman Building, St. Louis, Missouri

Directory of Commercial Attorneys

AMERICAN LAWYERS ANNUAL, The American Lawyers Annual Company, N. B. C. Building, Cleveland, Ohio

General Law Lists

AMERICAN BANK ATTORNEYS, American Bank Attorneys, 18 Brattle Street, Cambridge, Massachusetts

THE AMERICAN BAR, The James C. Fifield Company, Fawkes Building, Minneapolis, Minnesota

THE BAR REGISTER, The Bar Register Company, Inc., 300 Morris Avenue, Summit, New Jersey

CORPORATION LAWYERS DIRECTORY, Central Guarantee Company, Inc., 141 West Jackson Boulevard, Chicago, Illinois

THE EXPERT, International Information Bureau, 509 Minnesota Street, St. Paul, Minnesota

THE LAWYERS DIRECTORY, The Lawyers Directory, Inc., 18 East 4th Street, Cincinnati, Ohio

THE LAWYERS LIST, Lawyers List Publishing Company, 70 Fifth Avenue, New York City

RUSSELL LAW LIST, Russell Law List, 527 Fifth Avenue, New York City

SULLIVAN'S LAW DIRECTORY, Sullivan's Law Directory, 33 South Market Street, Chicago, Illinois

General Legal Directory

MARTINDALE-HUBBELL LAW DIRECTORY, Martindale-Hubbell, Inc., 1 Prospect Street, Summit, New Jersey

Insurance Law Lists

BEST'S RECOMMENDED INSURANCE ATTORNEYS, Alfred M. Best Company, Inc., 75 Fulton Street, New York City

HINES INSURANCE COUNSEL, Hine's Legal Directory, Inc., 38 South Dearborn Street, Chicago, Illinois

THE INSURANCE BAR, The Bar List Publishing Company, 343 South Dearborn Street, Chicago, Illinois

Interstate Commerce Commission Practitioners

NATIONAL GUIDE OF PRACTITIONERS BEFORE INTERSTATE COMMERCE COMMISSION AND MARITIME COMMISSION, The Traffic Service Corporation, 418 South Market Street, Chicago, Illinois

Probate Law List

RECOMMENDED PROBATE COUNSEL, Central Guarantee Company, Inc., 141 West Jackson Boulevard, Chicago, Illinois

State Legal Directories

The following state legal directories published by Legal Directories Publishing Company, 310 Reisch Building, Springfield, Illinois:

ILLINOIS LEGAL DIRECTORY

INDIANA LEGAL DIRECTORY

IOWA LEGAL DIRECTORY

KANSAS LEGAL DIRECTORY

MISSOURI LEGAL DIRECTORY

OHIO LEGAL DIRECTORY

PENNSYLVANIA LEGAL DIRECTORY

TEXAS LEGAL DIRECTORY

WISCONSIN LEGAL DIRECTORY

Foreign Law Lists

CANADA BONDED ATTORNEYS, CANADA LEGAL DIRECTORY, Canada Bonded Attorney & Legal Directory, Ltd., 57 Bloor Street, Toronto, Ontario, Canada

CANADIAN CREDIT MEN'S LEGAL DIRECTORY, Canadian Credit Men's Trust Association, Ltd., 137 Wellington St., West Toronto, Ontario, Canada

THE INTERNATIONAL LAW LIST, L. Corper-Mordaunt & Company, 104 High Holborn, London, W. C. 1, England

THE SCOTTISH LAW LIST, James Skinner & Company, Ltd., 27 Thistle Street, Edinburgh, Scotland

The Special Committee on Law Lists of the American Bar Association has issued Letters of Intention to the following publishers for the law lists or directories specified:

COLORADO AND NEBRASKA LEGAL DIRECTORY

MICHIGAN LEGAL DIRECTORY

OKLAHOMA LEGAL DIRECTORY

PACIFIC COAST LEGAL DIRECTORY FOR THE STATES OF CALIFORNIA, OREGON AND WASHINGTON. Legal Directories Publishing Company, 310 Reisch Building, Springfield, Illinois

REGISTRO PROFESIONAL DE ABOGADOS DE LOS ESTADOS UNIDOS DE AMERICA, Inter-American Legal Directory Company, 225 West 34th Street, New York City

In issuing a Letter of Intention, the Committee does not certify that a law list proposed to be issued will actually be issued or that it will comply with the Rules and Standards as to Law Lists. The Letter of Intention is issued solely upon the representations made by the publisher, as to the manner in which the list will be published, maintained and circulated.

Prior to issuing such a law list the publisher or promoter is required to file with the Committee a statement representing the manner in which it proposes to publish, maintain and circulate said list. If the representations in such statement indicate that said list will, when issued, meet the requirements of the Rules and Standards as to Law Lists, the Committee issues a Letter of Intention to the publisher. If the publisher so publishes the first complete edition of said list on or before December 31 of the year following the issuance of the Letter of Intention, the Committee then issues its formal Certificate of Compliance. If the publisher does not publish said list on or before the proposed issuance date, the Committee may either extend the time limit within which the publication may be published or may revoke the Letter of Intention.

WAR NOTES

By TAPPAN GREGORY
Of the Chicago Bar

REPORTS are constantly coming in of increased activity throughout the country among the state and local bar association war work committees, and also advising us of activities of long standing which are being continued and expanded.

At Tucson, Arizona, the Pima County Bar Association is rendering very effective legal service to those in the armed forces.

The State Bar of California is sending out a questionnaire, the answers to which will serve as a basis for establishing panels of lawyers to take care of the legal problems of soldiers and sailors.

The Committee of the Colorado Bar Association is organized into four parts: (a) For aid to men in the armed forces; (b) For defense and protection of the rights of civilians; (c) For assistance to lawyers and, (d) On public relations.

A Legal Institute is being arranged in Colorado and it is thought that a public information program may grow out of this.

Colonel Stites, Chairman of the Kentucky State Bar Association Committee, is continuing his very effective work and through his committee and through local bar association committees furnishing lawyers, stenographers and notaries at stated hours and days for legal assistance to men in the service at Fort Knox, establishing a legal clinic at Bowman Field and at Camp Campbell, and working towards the same end at Camp Breckenridge and Fort Thomas.

The state bar committee in Maine has printed and distributed widely a bulletin publicizing the availability of the committee's services.

The Detroit Bar Association was one of the very first to promote the project to find places for lawyers in defense industries.

In Minnesota the state bar committee is composed of presidents of all local district bar associations. The work of this committee is limited principally to rendering legal service to those in the armed forces and there is close cooperation with the legal aid societies in St. Paul, Minneapolis and Duluth.

Harry Rooks, chairman of the state bar committee in Missouri, has prepared a valuable and comprehensive summary, table and index on the Soldiers' and Sailors' Civil Relief Act and amendments, and we hope this will have wide distribution.

In New Hampshire, as in Maine, a printed bulletin makes known the readiness of the state bar committee to serve.

Jackson Dykman, chairman of the New York Bar committee, is making a canvass of all presidents of bar associations in the state asking for panels of lawyers to offer service in connection with general cases and to act as contact men for the Army Emergency Relief and the Red Cross.

The Onondaga County Bar Association of New York has been functioning now in the matter of legal aid to service men for some six months.

The Mecklenburg County Bar Association in North Carolina is cooperating closely with the Red Cross.

In Oklahoma, the Tulsa County Bar Association, having publicized widely the availability of the services of its committee, has handled between 3,000 and 5,000 cases of legal service since last year, has conducted an oratorical contest in the county high schools on the lawyer's part in national defense, works in close cooperation with the Red Cross, has mimeographed and distributed a set of forms of affidavit for Class B dependents who very frequently are ignorant of what information is needed and has been in constant touch with the real estate board committee looking to cooperation in the war effort.

In Pennsylvania, the state is well organized under the leadership of Joseph W. Henderson, who is the member of the American Bar committee for the third circuit. The Northampton County Bar Association in this state is working actively with the Red Cross.

The state bar committee in Rhode Island is ready in its response to all calls.

In South Carolina, the state bar committee supervised the establishment of clinics at Fort Jackson and Camp Croft, operated by the local county bars. The operation of the clinic at Fort Jackson has had to be abandoned because of gas rationing, but those lawyers who attended there are still rendering service from their offices.

In Tennessee, there is a very active state bar committee, well organized, working in close cooperation with the Red Cross.

The San Antonio Bar Association in the November 5 issue of its folder entitled *The Supoena* announces a program in honor of a number of army officers of the State Bar of Texas.

Under the chairmanship of Marion A. Olson, the San Antonio committee has established legal clinics to take care of the problems of those who cannot call upon the members of the committee. One of these is at the San Antonio Aviation Cadet Center. When the members of the committee attend to conduct a legal aid clinic, they take with them tools of their trade, such as notary public seals, portable typewriters, form books, and Martindale-Hubbell Law Directory. The cases handled by this committee range all the way from adoption proceedings to the defense of a soldier charged with murder. Radio broadcasts are employed to advise those in the service of the availability of legal assistance from the bar and Archie S. Brown has devised a temporary guardianship proceeding to take care of cases of

orphan minors without legal guardian who wish to enlist in the service.

The Wichita County (Texas) Bar Association has expressed a readiness to operate a clinic at Sheppard Field. Laredo Bar Association is working actively with the Red Cross. The Smith County Bar Association has expressed a desire to expand its usefulness.

Both the Virginia State Bar Association and the Virginia State Bar are well organized and anxious to be of service.

Offer of help in the matter of legal clinics also comes from West Virginia.

In Wisconsin, the state bar committee is completing its organization throughout the state, making contact with nearby army stations. The Milwaukee Bar Association committee is continuing valuable services it has been rendering for the last two years.

The state bar committees in Utah, California, Connecticut, Delaware, Illinois, Kentucky, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Wisconsin, and undoubtedly in other states by this time, have designated lawyers to act as agents for referrals from Army Emergency Relief and Navy Relief Society, as suggested by the American Bar Association committee.

Lawrence C. Spieth, member of the American Bar committee for the sixth circuit, is pursuing this subject and encouraging further organization and activity in the states of his circuit, where it appears that encouragement or suggestions would be useful.

The Toledo Bar Association is embarking on the effort to help lawyers secure employment in industrial plants engaged in producing war material. The Dayton Bar Association has a similar project in hand. This is also being actively pushed in Chicago, where some 500 odd lawyers have already sent in favorable reports to inquiry by questionnaire.

John Rhodes, member of the American Bar committee for the eighth circuit, is presently in communication with the states of his circuit looking to stimulation of war activities.

It appears from *The Bar Bulletin*, issued by the Bar Association of the City of Boston, that in May of this year a committee on war work was appointed with three principal objectives: (1) Assisting in every way possible to win the war; (2) Assisting lawyers to adjust themselves to the economical dislocations caused by the war; (3) Aiding in the rehabilitation of lawyers after the war. A list of lawyers is now being prepared at the request of one of the governmental departments in Washington concerning those who might be suitable to fill certain positions requiring lawyers.

In Indiana, under the chairmanship of Jeremiah L. Cadick, the state bar association's committee on war work has been rendering excellent service by way of free legal advice and assistance to members of the armed forces. Many references come from local Selective Service draft boards, and many through publicity in the local newspapers, local offices of the state welfare department, the home service units of the American Red Cross, and from legal officers attached to units of the Army, Navy and Marine Corps. A form of general power of attorney was prepared for use by Selective Service. Cooperation is being given in the promotion of the education of aliens for citizenship. A plan is being advanced for the establishment of a legal clinic at Camp Atterbury.

In Minnesota, the Hennepin County Bar Association has recently appointed a new committee on war activities to supplement the activities of the committee already in existence in handling problems of legal advice to members of the armed forces. This new committee, among other things, will cooperate closely with the civilian defense committee, furnish speakers to address meetings and talk over the radio, endeavor to aid in placing lawyers in defense plants and be prepared to advise upon all sorts of questions involved in or arising from blackouts.

The press advises us of the publication by the War Department of a booklet entitled, *Personal Affairs of Military Personnel and their Dependents,* obtainable from the Superintendent of Documents at ten cents a copy.

A memorandum opinion was recently handed down by Judge Hubbard of the Jefferson Circuit Court, Common Pleas Branch, in Kentucky, prescribing the method under which an automobile purchased on an installment contract by a soldier should be appraised and sold in such a way as to protect the interest of the soldier represented by installments paid by him. The case was brought to the attention of the Committee on War Work of the Kentucky State Bar Association in a letter from the soldier to Mr. Stites.

The United States Circuit Court of Appeals for the third circuit has decided that the war between the United States and Germany does not suspend the right of a citizen of Germany, resident in the United States, to prosecute a civil action in a court within the United States and that this right is enforceable by mandamus.

In a libel suit against a steamship for cargo damage, the United States District Court for the Southern District of New York holds that the action should not be dismissed under the Trading with the Enemy Act where the claim of the libelant has been transferred to a domestic insurance company to secure the repayment of money paid by the insurer. In this case the libelant, having been paid in full, had no interest in the action.

A justice of the peace is a local, legislative officer, and when he leaves to enter military service a temporary vacancy was created to be filled at the next general election for the balance of the unexpired term, subject to the resumption of office by the original incumbent if he returns to civil life before the expiration of the term for which he was originally elected, according to a holding of the Supreme Court of New York, at Special Term, Queens County.

ANDRES BELLO

The Blackstone of American Civil Law

By RALPH BOSCH

Ex-President of Pan-American Lawyers Association, New York

THE storm of American independence over, we see in the twilight of American republicanism the appearance of men who knew how to think and who made their patriotic contributions to the foundations of American institutions. We see them scattered all over the hemisphere, as if it were their own country, perhaps because they hoped that the dream of the Great Liberator Bolivar would come true and a country would cover all the continent, not making any particular nation their own.

Among the young men of that important historical era we see the author of the Chilean Civil Code, Andres Bello, poet, philologer, diplomat, jurist, philosopher, who, after studying medicine, abandoned it to study law, and then followed Bolivar to London in 1810, to further the cause of independence, where he stayed in diplomatic life to spend his youth through what could be termed a very romantic middle age. In the autumn of his life he sailed far away from the land of Blackstone to Chile where to his glory he was to spend his mature years teaching and drafting the legal monument, unequalled in the annals of civil law.

When Bello went to Chile he found a situation analogous to that in which Blackstone found English legislation and which prompted him to write his *Commentaries*. Out of the wilderness he conceived, drafted, redrafted and finally caused to be enacted a Civil Code which not only has been considered as one of the greatest legal monuments but has been copied by,[1] or has served as model,[2] for the codes of many other nations.[3]

He was especially fitted for the task. It may be of interest to know that he studied Spanish philology in London, but that was not the only treasure he gathered while in Albion. Without doubt he took with him when he left, the spirit of the English common law to influence what was to become American civil law when he grafted those principles into his work, thus partially returning to the civil law the debt which English legislation and jurisprudence owed to the old Roman or civil law. And it seems only natural that this should take place in the new hemisphere.

When it is considered that the greater territorial part of what is today the United States has at one time or another been governed by civil law and that even today many jurisdictions under its flag are governed by it, the history of American civil law must be of great interest to the American lawyer, especially in these days of hemispherical solidarity and understanding.

Bello was a great character, he possessed a good legal mind though he never practiced in court, and, what is more, was a true scholar. At the age of fifty he arrived in Chile, and from then on to the end of a glorious career (October 15, 1865) was the head of the University at Santiago and the Advisor of the Ministry of Foreign Relations. He was perhaps the best tutor that the young republic could have had, guiding her intelligently through the perilous days of her infancy, not only by advising her on international questions but by setting down the firm foundations on which her educational system was to rest.

A veritable pioneer in the intellectual wilderness of the post-colonial period, while teaching Roman law he wrote short textbooks among which is found his *International Law*. This brief treatise eventually was translated into many languages and came to be considered an authority on the subject. His famous *Castilian Grammar* catapulted him to honorary membership in the Spanish Royal Academy, wherein nestled its only rival or equal.

It would be a long report if we were to cover all his intellectual fruits, because he wrote on cosmography, history of ancient literature, natural sciences, philosophy, poetry, jurisprudence, etc. Among his chief works may be cited his *Orthology and Metrical Art of the Castilian Language, A Critical Study of the Poem of El Cid* and those already mentioned.

On Chile's emancipation[4] her legislation was in a state of chaos, as was the case in practically all the Spanish colonies; the laws of the Indies were a mountain of conglomerated edicts, royal decrees, and *pronunciamientos*, which, applied together with the Partidas, Nueva Recopilacion and Novisima Recopilacion and other codes of the Peninsula, constituted the colonial legislation. Confusion and uncertainty naturally reigned, even to the point that certain bodies of law were considered of doubtful applicability to some of the colonies. It was reasonable to expect that one of the first endeavors of its citizenry would be to formulate codifications which would answer to the requirements of their republican life.

Fortunately the Code Napoleon only a few years before had come into existence and had already proved its merits, thus aiding the legal minds of the early and middle 19th century which were engaged in drafting new Codes: Bello in Chile, Dalmacio Velez-Sarsfield

(Continued on page 852)

1. Ecuador 1860 and Columbia 1873 and 1887, etc.
2. Nicaragua, Uruguay, etc.
3. Argentina, Brazil, etc.
4. A school exists in Latin America sustaining the thesis that the American nations did not attain "independence" but "emancipation."

AMERICAN BAR ASSOCIATION
JOVRNAL

BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief ..... Chicago, Ill.
GEORGE MAURICE MORRIS, *President of Association* ..... Washington, D. C.
GUY RICHARDS CRUMP, *Chairman House of Delegates* ..... Los Angeles, Cal.
CHARLES P. MEGAN ..... Chicago, Ill.
JAMES GRAFTON ROGERS ..... Washington, D. C.
REGINALD HEBER SMITH ..... Boston, Mass.
THOMAS B. GAY ..... Richmond, Va.
WILLIAM L. RANSOM ..... New York City

General subscription price, $3 a year. Students in Law Schools, $1.50 a year. Price per copy, 25 cents.

EDITORIAL OFFICE

LOUISE CHILD ..... Assistant to the Editor-in-Chief
1140 N. Dearborn St. ..... Chicago, Ill.

Our First Year of War

SOON after this issue comes to the desks of American lawyers, the anniversary of Pearl Harbor and the full-pledged entrance of the United States into the world-wide struggle will be noted by an anxious, determined people. Fortunately, the end of the first year of our active participation in the fighting in many lands and on many seas has been heralded by most encouraging news, which confirms not only America's still mounting capacity to produce and transport, but also the initiative, skill and sheer courage of American soldiers, sailors, marines, and their leadership, in carrying the battle boldly to their more experienced adversaries and in coming through with victory in the toughest kinds of warfare.

As one's mind turns back to the shocking events of last December seventh and to the uncertain, troubled days and nights which long followed it, there is cheer and hope in the now manifest grounds for believing, as the long-silent churchbells of Britain have joyously proclaimed, that the tide in the great conflict has at last been turned, and that although tragic and hazardous enterprises still loom ahead, the ultimate outcome can be faced with growing confidence, with the end of the road perhaps soon to come in sight.

In this anniversary hour, the lawyers and people of America should renew their dedication to the cause for which free men in many lands, along with our own sons, are risking and giving their lives. The vast resistance which has everywhere sprung into being against Nazi domination has one motivation in common—the realization that life without freedom, justice, sense of responsibility, individual opportunity under law, is not worth living at all. Oppressed peoples of the earth have everywhere made their brave and dangerous choice. "The chips are down" everywhere, in the epic struggle to break the rule of force and fear and to restore freedom and the paths of peace. Men of free will have the courage to dare and do and give whatever may be required to bring the hour of liberation.

> "Fate never mixed another fight
> Since wars were first begun,
> With so much freedom to be
> lost or won."

At this critical stage of the war, the lawyers of America are proud and happy to be valiantly represented everywhere in the armed forces, proud and happy to be performing in governmental office many functions which are essential for the war effort, proud and glad to be mobilized as a profession to assist their country as well as their clients in the manifold tasks which devolve upon civilians during total war. In all manner of relationships and capacities, in their countless home communities, the lawyers of America are facilitating the processes of production for war, smoothing the relationships between employers and employees, assisting and expediting the work of draft boards and appeal boards, helping to adjust problems and perplexities of men in the armed forces or of their families or dependents.

Above all, it is especially the privilege and duty of American lawyers to help bring home to all of the people the nature of the struggle for survival as free men faithful to traditional institutions of law and justice, the vital issues which are at stake, the need for a sustained public morale, the necessity for cooperating cheerfully with the inconveniences and temporary limitations imposed by the exigencies of war, the importance of calm confidence in our military and naval leadership in this time of crisis along with enlightened and independent opinion as to the conduct of the war and the organization of the peace; and, perhaps chiefly, a vigilance and a vigorous insistence that the integrity and scope of free institutions of our country shall meanwhile be maintained and defended as zealously at home as they are being fought for on desert sands, in the remote mountains, and on the far seas. To tasks such as these the lawyers of America should pledge unceasingly their faith as well as their courage born of ancient traditions.

Lawyers and Public Opinion

AT the Detroit meeting retiring President Armstrong stressed the duty of the bar to help formulate a sound public opinion. Numerous inquiries have been made as to how this suggestion can best be translated into action.

The field of work for the individual lawyer is his own community. Most publicists—editors, columnists, broadcasters—who endeavor to mold public opinion, attempt to deal with it on a national scale. Necessarily, of course, the controlling opinion upon the vital issues which confront us must be the opinion of the nation.

However, the approach may well be local and the standing of the lawyer in his own community should give a sanction to his expression which is frequently absent when there is an entire lack of personal acquaintance. But for this sanction to exist there are three essentials: character which inspires respect, disinterestedness and adequate knowledge of the subject. The last of these requisites needs emphasis. The ability to express an informed public opinion upon the complicated questions with which we are now dealing and must continue to deal requires real study—study as intensive as that necessary for the preparation of an important and involved case. Only in this way can the lawyer achieve or merit the confidence of those to whom he addresses himself.

The work of every member of the bar who can qualify by character and information to express a sound judgment will not only be influential in his own circle, but will contribute to the formation of a sound national opinion.

Opportunities will not be lacking—conversation with friends and clients, addresses before civic organizations, articles in newspapers, the correction of erroneous statements and the combatting of unsound views. In these and in other ways the individual lawyer has an unexampled opportunity to be of service.

Are Lawyers "Non-Essential"?

IN our department of "Letters" we print excerpts from two which point to recent manifestations of old time jibes at lawyers. In one of those letters a columnist is quoted as listing "one hundred seventy-three thousand lawyers" among others "whose labor is not essential."

Such ignorant generalizations are not new. They need cause no concern. Even in the days of Chaucer, writers were poking fun at men of our profession. In the prologue to the *Canterbury Tales* there is listed on the roll of the nine and twenty storytelling pilgrims, a lawyer of whom it was said:

> "Nowher so besy a man as he ther n'as
> and yet he seemed besier than he was."

Shakespeare idealized Portia but put into the mouth of Jack Cade words which Jack never used, applying to "all the lawyers," words which Jack applied only to "all such as may be founde gylty by just and trewe enquery and by the law."

Warren in his *Ten Thousand a Year,* Hawthorne in his *House of Seven Gables,* Dickens in his *Pickwick Papers* and in *Bleak House* have lampooned the prolixity and procrastination of the pleading and procedure of their day but we must not forget the noble picture which Dickens draws of Edmond Danton in the *Tale of Two Cities.*

We are not disturbed by just criticism. The proof of that statement is the militant efforts of the bar to maintain and enforce the highest standards of professional ethics, and the condemnation of those who have been recreant to their oaths.

Those who think that the practice of law, in times of peace is a "non-essential occupation" should be reminded that man's struggle from the dark ages up into the light of day, has been a struggle against arbitrary power. The judicial institution was invented because it was recognized that there could be no peace and no civilization unless controversies could be settled by others than the parties to the dispute, and the rule of justice substituted for the rule of force. The men who administer justice, whether on the bench or at the bar or in the guidance of their clients and the protection of their rights, cannot truthfully be called "non-essential."

Recent jibes that lawyers are not essential in this global war, are based on obvious misconception. Men do not rally to the colors and enter the combat forces of their country, as lawyers, merchants, farmers, or clerks. The lawyer offers himself to his country in time of war as a citizen, just as does the merchant, the farmer, and the clerk. Every citizen is essential to the nation in a time of total war.

The commentator who speaks of lawyers as non-essential to the war effort should look about them and observe how great a number of lawyers are serving with the colors, fighting, winning, and sometimes giving up their lives with men of other professions and pursuits, in order that victory may be attained. At the last annual meeting of the North Carolina Bar Association, Colonel John D. Langston, of the Washington office of Selective Service, said that more than ten thousand lawyers were already in the Army, of which eight thousand were officers.

The idea that lawyers and everyone else, not in uniform, are "non-essential" is a concept which ignores the nature of this war. The lawyers who help to organize and facilitate production, the lawyers who foster the unity and militancy of community efforts on the home front, likewise have no reason to belittle or regret their roles in total war.

Undisturbed by all unfounded aspersions, the lawyer can be relied upon to do all within his powers of body and mind, to hasten the advent of Victory, and when force and arbitrary power have been defeated and when laws are to be devised and interpreted and administered for reconstructing a world based again on liberty and justice, the lawyers of this and every other land will play their distinguished and useful part.

REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

Law of War—Articles of War—Military Commissions—Prisoners of War—Spies—Saboteurs—Trial by Jury—Habeas Corpus—Federal Statutes, 28 U.S.C. § 347 (a)—Former Decisions, Ex parte *Milligan*, 4 Wall. 2, distinguished

Enemy agents and soldiers of a belligerent nation were landed at night from enemy submarines on our coast in military dress, bringing with them explosives and other means of destruction of war material and utilities, with intent to use them for hindering the Nation's war effort. They discarded their uniforms and assumed civilian dress and secretly passed through the military and naval lines and defenses of the United States. They were apprehended and charged with offenses against the law of war and the Articles of War. Because conduct of that character is "unlawful warfare" those accused of such conduct may be tried by military tribunals and are not entitled to demand trial by jury.

The President, as Commander in Chief of the Army and Navy, has constitutional and statutory authority to appoint a military commission for the trial of those charged with unlawful warfare, sabotage, spying, and other offenses against the law of war and the Articles of War. The commission appointed and convened under the President's order of July 2, 1942, was lawfully constituted and its procedure was lawfully conducted.

The accused were in lawful custody and showed no cause for release by habeas corpus.

Ex parte Quirin, et al, motions for leave to file petitions for habeas corpus.

U. S. ex rel Quirin, et al v. Cox, petitions for certiorari, 87 Adv. Op. 1; 63 Sup. Ct. Rep. 1 and 2. (Nos. 1, 2, 3, 4, 5, 6 and 7, July Special Term, 1942.)

NOTE: *The proceedings held in open court July, 1942, the state of the record, the positions of respective counsel as shown by their briefs and arguments, and the per curiam opinion of the Court on July 31, 1942, were reviewed in the September issue of the Journal (28 A. B. A. J. 604).*

This review refers to the "full" opinion which the CHIEF JUSTICE then stated would be prepared and filed with the clerk. It was filed on October 29, 1942, at the close of that day's session. This review and the review of the proceedings in the Supreme Court in our September issue should be read together.

The opinion was delivered by CHIEF JUSTICE STONE. It involves seven separate motions for leave to file in the Supreme Court petitions for writ of habeas corpus and seven separate petitions for certiorari to the United States Court of Appeals for the District of Columbia to review seven cases then pending on appeal from the District Court for the District of Columbia in which the district court denied leave to file petitions for habeas corpus. The question for decision is stated to be whether the detention of the petitioners for trial by Military Commission appointed by Order of the President of July 2, 1942, on charges purporting to set out violations of the law of war and of the Articles of War, is in conformity with the laws and the Constitution of the United States.

In view of the fact that the accused could only be heard if a special term of the Court should be convened at once, their counsel and the Attorney General united in a request for an immediate hearing. As to this the CHIEF JUSTICE says:

> . . . In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942. The applications for leave to file the petitions were presented in open court on that day and were heard on the petitions, the answers to them of respondent, a stipulation of facts by counsel, and the record of the testimony given before the Commission.

The CHIEF JUSTICE incorporates in his opinion a statement of the facts which appear from the petitions filed by the accused for their release by habeas corpus or which are shown by the record to have been stipulated by counsel:

> All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he has by his conduct renounced or abandoned his United States citizenship. . . . For reasons presently to be stated we do not find it necessary to resolve these contentions.
>
> After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.
>
> The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or

*Assisted by JAMES L. HOMIRE.

about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.

After a complete summary of the proceedings before the Military Commission the CHIEF JUSTICE says:

> While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner. . . . Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari. . . .

The main contention of the accused is stated by the CHIEF JUSTICE to be that the President is without any statutory or constitutional authority to order them to be tried by military tribunal for offenses with which they are charged, that they are entitled to trial in the civil courts by jury; that the President should not prescribe the procedure of the Commission and the method for the review of its findings and sentence, and that the proceedings of the Commission under the Order conflict with the Articles of War and are illegal and void. The CHIEF JUSTICE states the Government's answer to that contention as follows:

> The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force no court may afford the petitioners a hearing.

To the foregoing the CHIEF JUSTICE says that "there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case"; that neither the Proclamation nor the fact that the accused are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws forbid their trial by Military Commission. On that point the CHIEF JUSTICE says:

> As announced in our per curiam opinion we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue. We pass at once to the consideration of the basis of the Commission's authority.

Special emphasis is laid upon the declaration that the Court is not here concerned with any question of the guilt or innocence of the prisoners. The CHIEF JUSTICE says:

> . . . Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. . . . But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

It is declared that Congress and the President, like the courts, "possess no power not derived from the Constitution," but it is pointed out that one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." The pertinent provisions of the Constitution and the statutes in regard to the means by which Congress and the President may so "provide for the common defence" are set out, and it is said:

> The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

As to the powers which Congress has provided for the government of the Army under the Articles of War, some of which have referred only to the discipline of our own Army, it is pointed out that the Articles also recognize the "military commission" appointed by military command as "an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial"; also that the Articles authorize the President with certain limitations to "prescribe the procedure for military commissions"; that the Articles specifically authorize trial by court martial or military commission of those charged with the very offenses charged against the prisoners, namely, "relieving, harboring or corresponding with the enemy and those charged with spying." Reference is also made to the Espionage Act of 1917 which authorizes trial of certain offenses which tend to interfere with the prosecution of war and which provides also that nothing contained in the act shall be deemed to limit the jurisdiction of the general courts martial, military commissions or naval courts martial.

Continuing the CHIEF JUSTICE says:

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct

of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

It is declared that an important incident to the conduct of war is the adoption of measures by the military command, not only to repel and defeat the enemy, by to "seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." Laying other questions aside, the CHIEF JUSTICE proceeds to discuss the question whether the accused may be put on trial before a military commission for the offenses with which they are charged. On this the CHIEF JUSTICE says:

> We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan, supra.* But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.
>
> It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns.

Many cases are cited in support of the foregoing position and the CHIEF JUSTICE summarizes the conclusions drawn from those decisions as follows:

> By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. . . .
>
> Such was the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars.

The history of the holdings of our own military authorities before the adoption of the Constitution and during the Mexican and Civil Wars is examined, and in conclusion of this branch of the case the CHIEF JUSTICE says:

> Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear "fixed and distinctive emblems." And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war."
>
> By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

The several charges and specifications are next taken up seriatim and of the first specification of the first charge it is said:

> This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States.

It is declared that "modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the Armed Forces." Hence it is deduced that "every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other." It is pointed out that the law of war "cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are

agents similarly entering for the purpose of destroying fortified places or our Armed Forces," and it is said:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. . . . It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Approaching the contention of the accused that they are not subject to a military trial because no overt act has been committed by them in any of the acts of sabotage with which the prisoners are charged, the CHIEF JUSTICE says:

> Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.

As to the insistence of the accused that they were entitled under the Constitution to trial by jury, the CHIEF JUSTICE says:

> Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, . . . and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, . . . but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

As to the Fifth and Sixth Amendments, it is said that while those amendments guarantee the continuance of certain incidents of trial by jury, it did not enlarge the right to jury trial as established by Article III. Reference is made to petty offenses triable at common law without a jury, and to the trial of certain criminal contempts, and certain actions for debt to enforce a penalty, none of which were triable by jury at common law and none of which are brought within the scope of Article III by the provisions of the Fifth and Sixth Amendments. As to this point, the CHIEF JUSTICE says:

> . . . In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

As to the contention of the accused that not being members of the armed forces of the United States, the Amendment operates to give them the right to trial by jury, it is said:

> We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one "arising in the land . . . forces," when the accused is not a member of or associated with those forces. But even so, the exception cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

Continuing the examination of the constitutional right of trial by jury, the CHIEF JUSTICE says:

> The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our armed forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law.
>
> • • •
>
> Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal.

With special reference to the effect of the Fifth and Sixth Amendments, the CHIEF JUSTICE said:

> We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments—whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in

which they had been customary—as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Certain of the accused, and especially one Haupt, laid emphasis on the pronouncement of the Court in the *Milligan* case that the "law of war can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." In relation to that case the CHIEF JUSTICE says:

. . . Elsewhere in its opinion, at pp. 118, 121-22 and 131, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Counsel for the accused had challenged the adequacy of the second specification to Charge I, but it was declared by the Court that since the first specification of Charge I set forth a violation of the Articles of War, the Court had no reason for passing on the adequacy of the second specification of Charge I for the purpose of ascertaining whether the specifications under Charges II and III allege violations of the Articles or whether if so construed they are constitutional. Coming to the final contention that the President's Order of July 2, 1942, is unlawful because it provides an unlawful procedure and "that the secrecy surrounding the trial and all proceedings before the Commission" preclude a timely opportunity to test the lawfulness of the detention, the prisoners are still entitled to all the protection of procedure which Congress had provided by law (including trial by jury), the CHIEF JUSTICE says:

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions"—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

Mr. Justice MURPHY took no part in the consideration or decision of the case.

Federal Statutes—Agricultural Adjustment Act—Constitutional Law, the Commerce Clause; Due Process Clause—Farm Marketing Quotas—Evidence, Inadmissibility of Radio Broadcasts

The May 26, 1941 amendment of the Agricultural Adjustment Act of 1938, so far as it imposes a penalty on that part of a farmer's wheat crop in excess of the quotas fixed by the Secretary of Agriculture and approved by two-thirds of the wheat growers of the United States, is within the authority of the Commerce Clause, is not in conflict with the Due Process Clause of the Constitution, nor is its imposition retroactive or oppressive.

Claude R. Wickard, Secretary of Agriculture v. Roscoe C. Filburn, 87 Adv. Op. 57; 63 Sup. Ct. Rep. 82; U. S. Law Week 4011. (No. 59, decided November 9, 1942.)

An Ohio farmer brought an action against the Secretary of Agriculture to enjoin enforcement as to him of a marketing penalty imposed by the May 26, 1941 amendment of the Agricultural Adjustment Act of 1938 because of his refusal to limit his production of wheat to the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the amended act, applicable to him, were unconstitutional, because not sustainable under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment.

The case was submitted for decision on the pleadings and a stipulation of facts. It was heard in the district court by a statutory three-judge court. That court, one

judge dissenting, enjoined the enforcement of the penalty. The Secretary of Agriculture and his co-defendants appealed to the Supreme Court and that Court held the penalty provisions of the amendatory act valid and reversed the judgment of the district court.

The plaintiff farmer owned and operated a small dairy farm in Montgomery County, Ohio, selling milk, poultry and eggs. Regular practice was to raise a small acreage of winter wheat for feeding his cows and chickens, to grind some for flour for his own use and to sell the balance less a small amount reserved for seed.

In July, 1940, pursuant to the amended Agricultural Adjustment Act, he was given a wheat acreage allotment of 11.1 acres and a normal yield of 20 bushels of wheat per acre. He was given notice of that allotment in July, 1940 before the fall planting of his 1941 crop and again before it was harvested in 1942 but he sowed 23 acres and harvested 239 bushels of wheat more than the quota assigned to his 11.1 acres. His penalty was computed at $117.11.

The unanimous opinion of the Court was delivered by Mr. Justice JACKSON.

Of the provisions of the Act Mr. Justice JACKSON says:

> The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances.

As to the methods of ascertaining the allotments under the Act, it is said:

> The Act provides further that whenever it appears that the total supply of wheat as of the beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 per cent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year; and that during the marketing year a compulsory national marketing quota shall be in effect with respect to the marketing of wheat. Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a referendum of farmers who will be subject to the quota to determine whether they favor or oppose it; and if more than one-third of the farmers voting in the referendum do oppose, the Secretary must prior to the effective date of the quota by proclamation suspend its operation.

It was claimed and the lower court held that a public radio address to the wheat farmers of the United States by the Secretary of Agriculture invalidated the referendum. On this point Mr. Justice JACKSON says:

> On May 19, 1941 the Secretary of Agriculture made a radio address to the wheat farmers of the United States in which he advocated approval of the quotas and called attention to the pendency of the amendment of May 26, 1941, which had at the time been sent by Congress to the White House, and pointed out its provision for an increase in the loans on wheat to 85 per cent of parity. He made no mention of the fact that it also increased the penalty from 15 cents a bushel to one-half of the parity loan rate of about 98 cents, but stated that "Because of the uncertain world situation, we deliberately planted several million extra acres of wheat. . . . Farmers should not be penalized because they have provided insurance against shortages of food."
>
> Pursuant to the Act, the referendum of wheat growers was held on May 31, 1941. According to the required published statement of the Secretary of Agriculture, 81 per cent of those voting favored the marketing quota, with 19 per cent opposed.

As to the decision of the trial court concerning the legal effect of the referendum it is said:

> The court below held, with one judge dissenting, that the speech of the Secretary invalidated the referendum; and that the amendment of May 26, 1941, "in so far as it increased the penalty for the farm marketing excess over the fifteen cents per bushel prevailing at the time of planting and subjected the entire crop to a lien for the payment thereof," should not be applied to the appellee because as so applied it was retroactive and in violation of the Fifth Amendment; and, alternatively, because the equities of the case so required.

As to the evidentiary effect of the Secretary's broadcast Mr. Justice JACKSON says:

> The holding of the court below that the Secretary's speech invalidated the referendum is manifest error. Read as a whole and in the context of world events that constituted his principal theme, the penalties of which he spoke were more likely those in the form of ruinously low prices resulting from the excess supply rather than the penalties prescribed in the Act. But under any interpretation the speech cannot be given the effect of invalidating the referendum. There is no evidence that any voter put upon the Secretary's words the interpretation that impressed the court below or was in any way misled. . . . The record in fact does not show that any, and does not suggest a basis for even a guess as to how many, of the voting farmers dropped work to listen. . . .
>
> To hold that a speech by a Cabinet officer . . . may defeat a policy embodied in an Act of Congress, would invest communication between administrators and the people with perils heretofore unsuspected. . . . Appellee's complaint, in so far as it is based on this speech, is frivolous, and the injunction, in so far as it rests on this ground, is unwarranted.

As to the interpretation and application of the Commerce Clause, and the definition given by the Act of "market" and its derivative, Mr. Justice JACKSON says:

> It is urged that under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States* v. *Darby*,, 312 U. S. 100, sustaining the federal power to regulate production of goods for commerce except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives so that as related to wheat in addition to its conventional meaning it also means to dispose of "by feeding (in any form) to poultry or live-stock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined

> and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat either within or without the quota is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

The opinion summaries the contentions of counsel for the respective parties and in relation thereto says:

> The Government's concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

In the review of the "course of decision" Mr. Justice JACKSON refers to Chief Justice Marshall's opinion in *Gibbons v. Ogden* and declares that Marshall there described the federal commerce power "with a breadth never yet exceeded." Continuing the review of the "course of decision" it is pointed out that for nearly a century the decisions of the Court rarely dealt with questions of what Congress might do in the exercise of the granted power under the Commerce Clause, but dealt almost entirely "with the permissibility of state activity which it was claimed discriminated against . . . interstate commerce" and it is declared:

> It was not until 1887 with the enactment of the Interstate Commerce Act that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

It is pointed out that when the Court first dealt with this new legislation little scope was given to the power of Congress and a swing in judicial recognition of legislative power under the Commerce Clause is noted in the five cases in which the Court held that Acts of Congress in the Commerce Clause were in excess of its power. Reference is made to those cases which "called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*.

In the first of that line of cases, *Swift & Co. v. U.S.*, this opinion comments upon that of Mr. Justice Holmes in sustaining the exercise of national power over intrastate activity, in which Mr. Justice Holmes stated for the Court that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business."

The opinion points out that there grew a continuing appreciation of the fact that "the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation." It is said that in some of these cases which sustained the exercise of federal power over intrastate matters the term "direct" was used for the purpose of stating rather than of reaching a result; that in others it was treated as synonymous with "substantial" or "material" and that in others it was not used at all and that "of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause."

Taking up next the *Shreveport* rate cases the opinion points to the holding of the Court "that railroad rates of an admittedly intrastate character and fixed by authority of the state" might nevertheless be subject to federal control "because of the economic effects which they had upon interstate commerce." In this relation it is said:

> . . . The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of the conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."

Mr. Justice JACKSON declares that recognition of the economic effects of challenged statutes as a test "has made the mechanical application of legal formulas no longer feasible," and that with the acceptance of an economic measure of the extent of the power granted to Congress in the Commerce Clause, cases can no longer be decided simply by finding the activities in question to be "production," nor by calling their effect on commerce "indirect." On this point the opinion quotes the words of the present CHIEF JUSTICE in the *Wrightwood Dairy* case as follows:

> . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the Commerce Clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Mr. Justice JACKSON closes his review of the "course of decision" as follows:

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellant's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Coming to the facts set forth in a stipulation of the parties as to the economics of the wheat industry, Mr. Justice JACKSON emphasizes the importance of the commerce among states in wheat. It is noted that "Although wheat is raised in every state but one, production in most states is not equal to consumption." It is said that sixteen states produce surplus of wheat above their own requirements, that thirty-two states produce less than their consumption and have looked for their needed supply to surplus-producing states and it is said:

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than ten per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

Many countries, both importing and exporting, have sought to modify the impact of the world market conditions on their own economy. Importing countries have taken measures to stimulate production and self-sufficiency. The four large exporting countries of Argentina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed in part at least to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government.

As already stated in Mr. Justice JACKSON's opinion the point of fact which distinguishes this case from others that have preceded it is that it deals with the questions of use on the farm of the crop there produced and of this phase of the case Mr. Justice JACKSON says:

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

* * *

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such home-grown wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

In reply to the point made in the briefs and on the argument that "forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers," it is declared that regulation must lay "a restraining hand on the self-interest of the regulated" and that the conflicts of economic interest between the regulated and those who reap advantage from that regulation "are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process," and this point of discussion is closed with these words: "and with the wisdom, workability or fairness, of the plan of regulation we have nothing to do."

The opinion next proceeds to the consideration of the charge that the Act constitutes a deprivation of property without due process of law contrary to the Fifth Amendment and because of "alleged retroactive effect" of the legislation. Mr. Justice JACKSON replies that the validity of an Act of Congress is not to be refused application by the courts, as arbitrary, capricious, and forbidden by the Due Process Clause, "merely because it is deemed in a particular case to work an inequitable result." Consideration is also given to the farmer's claim that the Fifth Amendment requires "that he be free from penalty for planting wheat and disposing of his crop as he sees fit." On this point Mr. Justice JACKSON says:

We do not agree. In its effort to control total supply, the Government gave the farmer a choice which was, of course, designed to encourage cooperation and discourage non-cooperation. The farmer who planted within his allotment was in effect guaranteed a minimum return much above what his wheat would have brought if sold on a world market basis. Exemption from the applicability of quotas was made in favor of small producers. The farmer who produced in excess of his quota might escape penalty by delivering his wheat to the Secretary or by storing it with the privilege of sale without penalty in a later year to fill out his quota, or irrespective of quotas if they are no longer in effect, and he could obtain a loan of 60 per cent of the rate for cooperators, or about 59 cents a bushel, on

so much of his wheat as would be subject to penalty if marketed. Finally, he might make other disposition of his wheat, subject to the penalty. It is agreed that as the result of the wheat programs he is able to market his wheat at a price "far above any world price based on the natural reaction of supply and demand." We can hardly find a denial of due process in these circumstances, particularly since it is even doubtful that appellant's burdens under the program outweigh his benefits. It is hardly lack of due process for the Government to regulate that which it subsidizes.

In considering the point raised by the farmer that the amendment of May 26, 1941 had a retroactive effect on him and was therefore invalid Mr. Justice JACKSON says:

It is not to be denied that between seed time and harvest important changes were made in the Act which affected the desirability and advantage of planting the excess acreage. The law as it stood when the appellee planted his crop made the quota for his farm the normal or the actual production of the acreage allotment, whichever was greater, plus any carry-over wheat that he could have marketed without penalty in the preceding marketing year. The Act also provided that the farmer who, while quotas were in effect, marketed wheat in excess of the quota for the farm on which it was produced should be subject to a penalty of 15 cents a bushel on the excess so marketed. Marketing of wheat was defined as including disposition "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, . . ." The amendment . . . made before the appellee had harvested the growing crop, changed the quota and penalty provisions. The quota for each farm became the actual production of acreage planted to wheat less the normal or the actual production, whichever was smaller, of any excess acreage. Wheat in excess of this quota, known as the "farm-marketing excess" and declared by the amendment to be "regarded as available for marketing" was subjected to a penalty fixed at 50 per cent of the basic loan rate for co-operators, or 49 cents, instead of the penalty of 15 cents which obtained at the time of planting. At the same time there was authorized an increase in the amount of the loan which might be made to non-cooperators such as the appellee upon wheat which "would be subject to penalty if marketed" from about 34 cents per bushel to about 59 cents. The entire crop was subjected by the amendment to a lien for the payment of the penalty.

The provisions of the Act which bear upon this clause are reviewed and it is said:

The penalty provided by the amendment can be postponed or avoided only by storing the farm marketing excess according to regulations promulgated by the Secretary or by delivering it to him without compensation; and the penalty is incurred and becomes due on threshing. Thus the penalty was contingent upon an act which appellee committed not before but after the enactment of the statute, and had he chosen to cut his excess and cure it or feed it as hay, or to reap and feed it with the head and straw together, no penalty would have been demanded. Such manner of consumption is not uncommon. Only when he threshed and thereby made it a part of the bulk of wheat overhanging the market did be become subject to penalty. He has made no effort to show that the value of his excess wheat consumed without threshing was less than it would have been had it been threshed while subject to the statutory provisions in force at the time of planting. Concurrently with the increase in the amount of the penalty Congress authorized a substantial increase in the amount of the loan which might be made to co-operators upon stored farm marketing excess wheat. That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law.

The case was argued by Mr. Charles Fahy, Solicitor General, for the Secretary of Agriculture, and by Mr. Webb R. Clark and Mr. Harry N. Routzohn, for the farmer.

Criminal Law—Conspiracy—Statutes of Limitations—Joinder of Distinct Charges of Violations of Several Statutes in an Indictment for a Single Conspiracy—Cumulation of Penalties

Where the indictment charges and the proof sustains a single conspiracy to violate different provisions of the Internal Revenue laws, only a single penalty can be imposed. The statute of limitations prescribed by the Internal Revenue Code where the object of a conspiracy is to defeat the payment of a federal tax is applicable rather than the three-year statute of limitations applicable generally to criminal offenses for a conspiracy to violate the revenue acts.

Braverman v. U. S., 87 Adv. Op. 83; 63 Sup Ct. Rep. 99; U. S. Law Week 4027. (Nos. 43, 44 decided Nov. 9, 1942.)

Persons who collaborated in the illicit manufacture, transportation, and distribution of distilled spirits, were indicted with others on seven counts, each count charging a conspiracy to violate a separate and distinct Internal Revenue law.

At the conclusion of the evidence counsel for the accused renewed a motion previously made, to compel the Government to elect one of the several counts on which to proceed, contending that the proof did not establish more than one conspiracy. The Government's attorney took the position that the seven counts of the indictment charged as distinct offenses the several illegal objects of one continuing conspiracy, and that for each offense a separate penalty might be imposed.

The district judge submitted the case to the jury on that theory. The jury returned a verdict "guilty as charged" and the court sentenced each to eight years imprisonment. On appeal the Circuit Court of Appeals affirmed. Certiorari was allowed to resolve " an asserted conflict of decisions." The Supreme Court reversed. The opinion of the Court was delivered by the CHIEF JUSTICE.

In the opening paragraph of his opinion the CHIEF JUSTICE stated the questions for decision as follows:

. . . Whether a conviction upon the several counts of an indictment, each charging conspiracy to violate a different provision of the Internal Revenue laws, where the jury's verdict is supported by evidence of but a single conspiracy, will sustain a sentence of more than two years' imprisonment, the maximum penalty for a single violation of the conspiracy statute, and whether the six-year period of limitation prescribed by § 3748 (a) of the Internal Revenue Code is applicable to offenses arising under § 37 of the Criminal Code, 18 U. S. C. 88 (the conspiracy statute), where the object of the conspiracy is to evade or defeat the payment of a federal tax.

The opinion summarizes the conclusion of the Circuit Court as follows:

> . . . On appeal the Court of Appeals for the Sixth Circuit affirmed, . . . on the authority of its earlier decisions in *Fleisher v. United States,* 91 F. 2d 404 and *Meyers v. United States,* 94 F. 2d 433. It found that "From the evidence may be readily deduced a common design of appellants and others followed by concerted action to commit the several unlawful acts specified in the several counts of the indictment." It concluded that the fact that the conspiracy was "a general one to violate all laws repressive of its consummation does not gainsay the separate identity of each of the several conspiracies." . . .
>
> Both courts below recognized that a single agreement to commit an offense does not become several conspiracies because it continues over a period of time, . . . and that there may be such a single continuing agreement to commit several offenses. But they thought that in the latter case each contemplated offense renders the agreement punishable as a separate conspiracy.

As to the question of accumulation of penalties the CHIEF JUSTICE says:

> . . . Where each of the counts of an indictment alleges a conspiracy to violate a different penal statute it may be proper to conclude, in the absence of a bill of exceptions bringing up the evidence, that several conspiracies are charged rather than one, and that the conviction is for each. . . . But it is a different matter to hold, as the court below appears to have done in this case and in *Meyers v. United States, supra,* that even though a single agreement is entered into, the conspirators are guilty of as many offenses as the agreement has criminal objects.

In regard to the nature of the offense under consideration it is said:

> The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts "where one or more of such parties do any act to effect the object of the conspiracy." The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime. . . . But it is unimportant, for present purposes, whether we regard the overt act as a part of the crime which the statute defines and makes punishable, . . . or as something apart from it, either an indispensable mode of corroborating the existence of the conspiracy or a device for affording a *locus poenitentiae.* . . .

Emphasizing the importance of the agreement which embraces and defines the object of the conspiracy, the CHIEF JUSTICE says:

> . . . A conspiracy is not the commission of the crime which it contemplates, and neither violates nor "arises under" the statute whose violation is its object. . . . Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. . . . The single agreement is the prohibited conspiracy and however diverse its objects it violates but a single statute, § 37 of the Criminal Code. For such a violation only the single penalty prescribed by the statute can be imposed.

Counsel for the accused contended that the prosecution of the defendant, Wainer, was barred by the three-year statute of limitations since he withdrew from the conspiracy more than three although not more than six years before his indictment. This brought up the question whether the general statute of limitations applicable to criminal offenses or the particular statute of limitations in regard to the prosecution of the violations of revenue acts controlled.

The opinion calls attention to the amendment of the six-year statute of limitations reading as follows:

> For offenses arising under section 37 of the Criminal Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years.

and of the effect of that amendment the CHIEF JUSTICE says:

> . . . To be within this last paragraph it is not necessary that the conspiracy have as its object the commission of an offense in which defrauding or attempting to defraud the United States is an element. It is enough that the conspiracy involves an attempt to evade or defeat the payment of federal taxes, which was among the objects of the conspiracy of which petitioner was convicted. Enlargement, to six years, of the time for prosecution of such conspiracies was the expressed purpose of the amendment. See H. R. Rep. No. 1492, 72d Cong., 1st Sess., 29.

The judgment of conviction was reversed and the case remanded to the district court with directions to resentence the defendant in conformity with this opinion.

The case was argued by Mr. James J. Magner for the accused in No. 43; by Mr. John E. Dougherty for the accused in No. 44; and by Mr. W. Marvin Smith for the Government.

Alien Enemies—Their Right To Be Heard in Our Courts—Mandamus

Non-resident alien enemies, in time of war, can neither trade or contract with our citizens; but alien enemies lawfully residing in the United States before the declaration of a state of war may invoke the aid of our courts to enforce or protect rights which lawfully accrued before the War.

Mandamus is an appropriate remedy to enforce the right to be so heard in court.

Ex parte Kawato, 87 Adv. Op. 94; 63 Sup. Ct. Rep. 115; U. S. Law Week 4024. (No. 10, Original, decided November 9, 1942.)

Kawato, born in Japan, became a resident of the United States in 1905. He was employed on the vessel *Rally* as a seaman and fisherman. While so employed he suffered bodily injuries. April 15, 1941, he filed a libel in admiralty against the vessel for wages and an allowance for maintenance and care.

On January 20, 1942, claimants of the vessel appeared and moved to abate the action because Kawato had become an enemy alien and therefore had no right to prosecute any action in any court of the United States pending that war. The district judge granted the motion. Kawato sought mandamus in the Circuit Court of Appeals, Ninth Circuit, to compel the district court to vacate its judgment of dismissal and proceed to trial of his action, but his motion for leave to file was denied. The Supreme Court granted leave to file the petition in that court and the case was submitted on answer, briefs and oral argument, and the judgment reversed.

Mr. Justice BLACK delivered the opinion of the Court.

It was argued in support of the judgments of the lower courts that the writ should be denied because the Court could have dismissed the bill for defects in the allegations of the libel. In reply to that, Mr. Justice BLACK says:

> . . . These contentions are irrelevant here. Unless the action was properly abated for the reasons set out in the motion and the Court's order, the petitioner is entitled to have the District Court proceed with his action and pass upon the sufficiency of his allegations. This is an essential step in an orderly trial leading to a final judgment from which an appeal will lie to correct errors. If the Court's order of abatement was erroneous, mandamus is the appropriate remedy.

As to the meaning of the words "alien enemy," Mr. Justice BLACK says:

> "Alien enemy" as applied to petitioner is at present but the legal definition of his status because he was born in Japan with which we are at war. Nothing in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them. His suit invokes the protection of those laws through our courts both to obtain payment of wages alleged to have been promised him by American citizens for lawful work and reimbursement on account of damages suffered while working for those citizens.

Kawato had contended that the common law supported his right to be heard and that the statutes had not taken away that right. To that contention Mr. Justice BLACK says:

> There doubtless was a time when the common law of England would have supported dismissal of petitioner's action, but that time has long since passed. A number of early English decisions, based on a group concept which made little difference between friends and enemies barred all aliens from the courts. This rule was gradually relaxed as to friendly aliens until finally in *Wells v. Williams*, 1 Ld. Raym. 282 (1698), the Court put the necessities of trade ahead of whatever advantages had been imagined to exist in the old rule, and held that enemy aliens in England under license from the Crown might proceed in the courts. As applied ever since, alien enemies residing in England have been permitted to maintain actions, while those in the land of the enemy were not; and this modern, humane principle has been applied even when the alien was interned as is petitioner here.

It is pointed out that the original English common law rule, long ago abandoned there, was, from the beginning, objectionable in this country "whose life blood came from an immigrant stream." Heroic and patriotic action in the War for Independence and the War of 1812 are instanced to show the contributions made by millions of immigrants "who have learned to love the country of their adoption more than the country of their birth." The opinion of Chief Justice Kent, in *Clarke v. Morey*, 10 Johns. 69, 72, is cited as having set the legal pattern which, with sporadic exceptions, has since been followed, and from that opinion the following is quoted:

> . . . "A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity." Thus the courts aligned their policy with that enjoined upon the President by Congress in 1812 when it directed him to administer the laws controlling aliens in a manner that would be "consistent with the public safety, and according to the dictates of humanity and national hospitality."

It was argued below and in the briefs above, that Kawato is barred from the courts by the "Trading With the Enemy Act," and the particular clause relied on is Section 7 which reads as follows:

> Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in Section 10 hereof [which relates to patents].

It is held in the opinion that the language of the statute and its legislative history makes doubly certain that the Section was not meant to apply to such a case as this, and it is said that Section 7 barred only "enemy or ally of enemy"; that "alien enemy" is defined as "those residing within the territory owned or occupied by the enemy; the enemy government or its officers, or citizens of an enemy nation, wherever residing, as the President by proclamation may include within the definition"; and that since the President has not under this Act made any declaration as to enemy aliens, the Act does not bar maintenance of this suit. On this point, Mr. Justice BLACK says:

> This interpretation, compelled by the words of the Act, is wholly in accord with its general scope, for the Trading With the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all. Prior to the passage of the Act, the courts had consistently held that during a state of war, commercial intercourse between our nationals and non-resident alien enemies, unless specifically authorized by Congress and the Executive, was absolutely prohibited, and that contracts made in such intercourse were void and unenforceable. This strict barrier could be relaxed only by Congressional direction, and therefore the Act was passed with its declared purpose "to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit under careful safeguards and restrictions, certain kinds of business to be carried on." Thus Congress expressly recognized by the passage of the Act that "the more enlightened views of the present day as to treatment of enemies makes possible certain relaxations in the old law."

Again it is declared in the opinion that:

> Not only has the President not seen fit to use the authority possessed by him under the Trading With the Enemy Act to exclude resident aliens from the courts, but his administration has adopted precisely the opposite program. The Attorney General is primarily responsible for the administration of alien affairs. He has construed the existing statutes and proclamations as not barring this petitioner from our courts, and this stand is emphasized by the government's appearance in behalf of petitioner in this case.

Closing his opinion Mr. Justice BLACK declared:

> The consequence of this legislative and administrative policy is clear authorization to resident enemy aliens to proceed in all courts until administrative or legislative action is taken to exclude them. Were this not true, contractual promises made to them by individuals, as well as

promises held out to them under our laws, would become no more than teasing illusions. The doors of our courts have not been shut to peaceable law-abiding aliens to enforce rights growing out of legal occupations. Let the writ issue.

The case was argued by Mr. Lesher B. Gallagher for respondent and case submitted by Kumezo Kawato, *pro se*.

Federal Statutes—Fair Labor Standards Act—Overtime Compensation—Production of Goods for Interstate Commerce

The owners and operators of drilling equipment, who contract with owners or lessees of oil lands to drill holes to an agreed-upon depth short of the oil sand stratum, are engaged in production of oil. Those employed by the owners of the drilling equipment to do the work of drilling the holes with that equipment, are engaged in the production of goods for interstate commerce, and are entitled to the rate of pay for overtime fixed by the Fair Labor Standards Act.

Warren-Bradshaw Drilling Co. v. Hall, 87 Adv. Op. 99; 63 Sup. Ct. Rep. 125; U. S. Law Week 4015. (No. 21, decided November 9, 1942).

This case involves a slightly different phase of the controversy which was presented to the Court in *Kirschbaum Co. v. Walling*, 316 U. S. 517, 28 A.B.A.J. 488, in the interpretation of the Fair Labor Standards Act to a particular situation. The petitioner, a drilling company, hereinafter called employer, was engaged in the business of contracting with the owners or lessees of oil lands to drill holes to an agreed-upon depth short of the oil sand stratum. When that depth is reached the drilling equipment is removed and the machinery and crew removed to other locations. A cable drilling crew then undertakes with cable tools to "bring in" the well or demonstrate that it is a dry hole. The respondents, hereinafter called employees, were employed by the drilling company as members of its rotary drilling crew and worked on approximately thirty-two wells in the Panhandle Oil Field of Texas; thirty-one of which produced oil, and the other gas.

Taking up the language of the Act, and its interpretation, Mr. Justice MURPHY says:

> In § 3 (j) Congress has broadly defined the term, "produced," and has provided that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." Whether or not respondents, in drilling to a specified depth short of oil, may be regarded as engaged in producing or mining, and we certainly are not to be understood as intimating that they may not, recognition of the obvious requires us to hold that at the very least they were engaged in a "process or occupation necessary to the production" of oil. Oil is obtained only by piercing the earth's surface; drilling a well is a necessary part of the productive process to which it is intimately related. The connection between respondents' activities in partially drilling wells and the capture of oil is quite substantial, and those activities certainly bear as "close and immediate tie" to production as did the services of the building maintenance workers held within the Act in *Kirschbaum Co.* v. *Walling*. . . .

It is declared that the evidence supports the finding that some of the oil produced, ultimately found its way into interstate commerce, that all of the wells had pipeline connections, some of them operated on a national scale, and that a large percentage of the crude oil was sent to refineries in the State of Texas, thereafter passing out of the state in the form of refined products.

The employer contests the applicability of the Act on the ground that it is an independent contractor not financially interested in the wells, with no intention or expectation that any oil produced through its efforts would be shipped in interstate commerce and cited in support of that position the *Darby* case, 312 U. S. 100, where it was said that:

> . . . the "production for commerce" intended by Congress includes "at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce."

Employees counter that the owner of the oil wells expected the oil produced to move across state lines, and the Court held that the Act extends at least to the employer who expects goods to move in interstate commerce, citing the *Darby* case, *supra*, and Mr. Justice MURPHY says:

> . . . Assuming that such expectation, or a reasonable basis therefor, was necessary on petitioner's part before the application of the Act to petitioner, it is here present. The record contains ample indication that there were reasonable grounds for petitioner to anticipate, at the time of drilling, that oil produced by the wells drilled, would move into other states. Petitioner, closely identified as it is with the business of oil production, cannot escape the impact of the Act by a transparent claim of ignorance of the interstate character of the Texas oil industry.

Employees were employed on a basis of an eight hour day and ordinarily worked seven days a week, receiving wages ranging from $6.50 to $11 per day. There was no agreement providing for an hourly rate of pay or that the weekly salary provided additional compensation for overtime. The employer urges that it complied with the overtime compensation requirements of the Act because the employees received wages in excess of the statutory minimum wage for all overtime hours and that acceptance of that pay by the employees impliedly constituted acceptance of overtime compensation. Of that contention, Mr. Justice MURPHY said that the contention merited but slight consideration and that a similar argument had been squarely rejected in *Overnight Motor Co. v. Missel*, 316 U. S. 572, 28 A.B.A.J. 491.

Mr. Justice ROBERTS dissented. He says:

> I dissent, as I did in *Kirschbaum* v. *Walling*, 316 U. S. 517, and for the same reasor. But I think the present a more extravagant application of the statute than that there approved. We may assume that Congress, in drafting the Act, had in mind the practical, as distinguished

from a theoretical, distinction between what is national and what is local,—between what, in fact, touches interstate commerce and what, in truth, is intrastate.

The phrases on which respondent relies are these: An employee "who is engaged in [interstate] commerce or in the production of goods for [interstate] commerce." . . . (§ 7a); and " 'Produced' means produced, manufactured, mined, handled or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (§ 3j.)

The opinion disavows any thought that the petitioners may not be classed as those who mine the oil which passes into commerce; but this seems to be a reservation intended not to preclude such a holding. The Court relies, rather, on the Act's inclusion of anyone employed "in any process or occupation necessary to the production" of goods for commerce.

The reasoning seems to be as follows. The oil will pass into commerce if it is mined. But it cannot be mined unless somebody drills a well. An independent contractor's men do part of the drilling. Their work is "necessary" to the mining and the transportation of the oil. So they fall within the Act.

This is to ignore all practical distinction between what is parochial and what is national. It is but the application to the practical affairs of life of a philosophic and impractical test. It is but to repeat, in another form, the old story of the pebble thrown into the pool, and the theoretically infinite extent of the resulting waves, albeit too tiny to be seen or felt by the exercise of one's senses.

The labor of the man who made the tools which drilled the well, that of the sawyer who cut the wood incidentally used, that of him who mined the iron of which the tools were made, are all just as necessary to the ultimate extraction of oil as the labor of petitioners. Each is an antecedent of the consequent,—the production of the goods for commerce. Indeed, if petitioners were not fed, they could not have drilled the well, and the oil would not have gone into commerce. Is the cook's work "necessary" to the production of the oil, and within the Act?

I think Congress could not and did not intend to exert its granted power over interstate commerce upon what in practice and common understanding is purely local activity, on the pretext that everything everybody does is a contributing cause to the existence of commerce between the states, and in that sense necessary to its existence.

The case was argued by Mr. Frank Settle for the employer and by Mr. Dallas Scarborough for the employees.

Taxation—Undistributed Profits Tax—Credit for Debt Payments

The credit against the undistributed profits tax, on account of a contract to apply a percentage of earnings in payment of debts, is allowable only upon strict compliance with the statutory conditions precedent. The condition that the earnings specified must be paid within the taxable year or irrevocably set aside within the taxable year for the discharge of the debt is not met by a contract requiring a percentage to be paid on or before a certain date in the following year, notwithstanding that the percentage was in fact paid during the taxable year.

Helvering, Commissioner v. The Ohio Leather Company; Same v. Strong Manufacturing Company; Same v. Warren Tool Corporation. 87 Adv. Op. 78; 63 Sup Ct. Rep. 103; U. S. Law Week 4018. (Nos. 40, 41, and 42, decided Nov. 9, 1942.)

This opinion disposes of three cases in which the question for decision was whether the taxpayers were entitled to credits against their undisturbed profits tax for the 1936 taxable year under Section 26 (c) (2) of the Revenue Act of 1936.

In each case the taxpayer corporation had made written contracts to apply a percentage of its net earnings of the particular calendar year to indebtedness of the corporation, the agreements providing merely that payment of the specified percentage was to be made on or before a certain date in the year *following* the calendar year during which the net earnings arose. In fact the specified percentage was paid *during* the taxable year in each case. The taxpayers accordingly sought to avail themselves of the credit authorized by Section 26 (c) (2) which relieves from the tax imposed by Section 14 any profits which may not be distributed because of a contract requiring that a portion of earnings of the taxable year be paid or irrevocably set aside *within* the taxable year for the discharge of the debt.

The Commissioner denied the credits and assessed deficiencies but the Board of Tax Appeals overruled the Commissioner and the Circuit Court of Appeals affirmed the Board. On certiorari the judgments were reversed by the Supreme Court in an opinion by Mr. Justice MURPHY. He points out that the statute sets up three conditions precedent which must be complied with before the credit is applicable. The opinion recognizes that the taxpayers here complied with the first two conditions, but concludes that they failed to comply with the third, namely, that the percentage of profits must be either paid or irrevocably set aside *within the taxable year* for the discharge of the debt. The respect in which the taxpayers here failed to comply with the third condition, together with a summary of the statutory requirements, is set forth in the following portion of the opinion:

> Section 26 (c) (2) expressly sets up three specific conditions precedent with which a corporation devoting part of its earnings to the payment of debts rather than the payment of dividends must comply before it is entitled to relief from the tax on undistributed profits—(1) there must be a written contract executed by the corporation prior to May 1, 1936; (2) this contract must contain a provision expressly dealing with the disposition of earnings and profits of the taxable year; and, (3) this contract must contain a provision requiring that a portion of such earnings and profits either (a) "be paid within the taxable year in discharge of a debt," or (b) "be irrevocably set aside within the taxable year for the discharge of a debt." A taxpayer whose contract satisfies each of these three requirements is entitled to a credit to the extent of the amount which has been so paid or irervocably set aside.
>
> While taxpayers have met the first two statutory requirements—the written contracts antedate May 1, 1936, and contain provisions expressly dealing with the disposition of earnings for the taxable year—, they have not met the third one. The contracts clearly contain no provision requiring the payment of earnings "within the taxable year in discharge of a debt." Nor do they, contrary to tax-

payers' assertion, require the irrevocable setting aside of earnings "within the taxable year for the discharge of a debt" within the meaning of § 26 (c) (2). The contracts are wholly silent in respect of any setting aside; they do not in terms require taxpayers to set aside the amount due, nor do they direct any segregation or physical retention whatsoever. The only requirement is that taxpayers pay on or before a date *after* the close of the taxable year. This is not enough. Until that date taxpayers were free to use the specified percentages as they pleased, so far as the agreements were concerned. That prudent business judgment, or the possibility of fiduciary liability imposed by operation of law might have constrained taxpayers to refrain from using these percentages and actually to set them aside is immaterial; such setting aside was not required by the terms of the written contracts, and therefore did not satisfy § 26 (c) (2). . . . Likewise the fact that taxpayers actually irrevocably set the funds aside by anticipatory payments within the taxable year is of no moment, because these payments were voluntary and not pursuant to the command of the agreements.

That Congress did not intend that the statutory condition of an irrevocable setting aside would be satisfied by a contract which, without more, merely requires that a percentage of earnings of the taxable year be paid in some future year for the discharge of a debt, is evident because such a construction reduces the alternative condition of § 26 (c) (2) relating to actual payment within the taxable year to a meaningless superfluity. The date specified for payment would become immaterial for all purposes if the mere requirement by contract of future payment out of earnings in a given year automatically entails an "irrevocable setting aside" within that year.

Taxpayers here place great emphasis upon the different prepositions used in the alternative phrases—"to be paid within the taxable year *in* discharge of a debt, or to be irrevocably set aside within the taxable year *for* the discharge of a debt"—to show that payment may be made after the taxable year compatibly with § 26 (c) (2). True enough, payment can be postponed to a future year and a credit allowed if, but only if, the contract directing such future payments requires in terms the irrevocable setting aside within the taxable year of those future payments. The instant contracts do not so provide.

The case was argued by Mr. Valentine Brooks for the Commissioner of Internal Revenue, by Mr. Donald J. Lynn for the Taxpayer in No. 40, by Mr. Raymond S. Powers for the Taxpayer in No. 41 and by Mr. Raymond T. Sawyer, Jr., for the Taxpayer in No. 42.

Taxation—Federal Estate Tax—Apportionment Under New York Decedent Estate Law

Section 124 of the New York Decedent Estate Law which provides that, except as otherwise directed by will, the burden of the federal death taxes paid by an executor be spread proportionately among the distributees is consistent with the provision of the Federal Internal Revenue Code and is not unconstitutional on account of any asserted inconsistency with the Federal Estate Tax Law.

Riggs v. del Drago. 87 Adv. Op. 69; 63 Sup. Ct. Rep. 109; U. S Law Week 4017. (No. 30, decided November 9, 1942.)

This case presented the question whether § 124 of the New York Decedent Estate Law is unconstitutional because in conflict with the federal estate tax law, Internal Revenue Code, § 800, *et seq*. Section 124 provides in effect that, except as otherwise directed by will, the burden of federal death taxes paid by the executor shall be spread proportionately among the distributees.

The testatrix bequeathed $300,000 outright to one respondent and created a trust of $200,000 for the other for life with remainder over. The residue was left in trust for life for the benefit of the respondent who got the $300,000 bequest, with remainder over. The will contained no reference to payment of taxes.

The executors paid about $230,000 on account of the federal estate tax, and asked the Surrogate to determine whether that payment should be equitably apportioned among all beneficiaries, under § 124 of the Decedent Estate Law. Two of the beneficiaries answered, objecting to the constitutionality of that section. The guardian of infant remaindermen under the trusts urged that the tax be apportioned. The Surrogate overruled the constitutional objections and ordered apportionment. The Court of Appeals of New York reversed, holding § 124 repugnant to the federal estate tax law—especially to § 826 (b) of the Internal Revenue Code—and hence in conflict with the supremacy and uniformity clauses of the Constitution.

On certiorari the Supreme Court reversed the judgment, in an opinion by Mr. Justice MURPHY. The conclusion of the Court is stated as follows:

> We are of opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax: accordingly, § 124 is not in conflict with the federal estate tax law. This conclusion is based upon the provisions of the Revenue Act of 1916, 39 Stat. 756, and subsequent acts, their legislative history and their administrative interpretation.

Section 826 (b) provides that "If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor . . . such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest . . . would have been reduced if the tax had been paid before the distribution . . . it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will . . . the tax shall be paid out of the estate before its distribution."

The proper construction of § 826 (b) in the circumstances is then elaborated.

> . . . that section does not direct how the estate is to be distributed, nor does it determine who shall bear the ultimate burden of the tax. As pointed out before, while the federal statute normally contemplates payment of the tax before the estate is distributed, § 822 (b) of the Code, provision is made for collection of the tax if distribution should precede payment, § 826 (a). If any distributee is thus called upon to pay the tax, § 826 (b) provides that such person "shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if

the tax had been paid before the distribution of the estate." By that section Congress intended to protect a distributee against bearing a greater burden of the tax than he would have sustained had the tax been carved out of the estate prior to distribution; any doubt that this is the proper construction is removed by the concluding clause of the section specifically stating that it is "the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." Section 826(b) does not command that the tax is a non-transferable charge on the residuary estate; to read the phrase "the tax shall be paid out of the estate" as meaning "the tax shall be paid out of the *residuary* estate" is to distort the plain language of the section and to create an obvious fallacy. For in some estates there may be no residue or else one too small to satisfy the tax; resort must then be had to state law to determine whether personalty or realty, or general, demonstrative or special legacies abate first. In short, § 826(b), especially when cast in the background of Congressional intent discussed before, simply provides that, if the tax must be collected after distribution, the final impact of the tax shall be the same as though it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be.

The case was argued by Mr. John W. Davis for the petitioner, Riggs, and by Mr. Henry Cohen for the del Dragos; the case was submitted by Mr. Anthony J. Caputa for the executor, and by Mr. Harold W. Hastings for the guardian.

Bankruptcy—Chapter X—Petition to Be Dismissed If Not Filed in Good Faith—Effect of Prior Proceedings

Under Chapter X of the Bankruptcy Act a petition for reorganization must be dismissed if the judge is not satisfied that it was filed in good faith. By the terms of the statute, a petition is not filed in good faith if prior proceedings are pending in any court and it appears that the interest of creditors and stockholders would be best served in the prior proceedings.

Where there is a first mortgage on the debtor's property for a debt in excess of the value of the property and a foreclosure proceeding is pending in a state court, the best interests of creditors and stockholders are subserved by the continuation of the foreclosure proceeding and a petition filed by the debtor under Chapter X should be dismissed as not filed in good faith.

Marine Harbor Properties, Inc. v. Manufacturers' Trust Company, 87 Adv. Op. 73; 63 Sup Ct. Rep. 93; U. S. Law Week 4020. (No. 24, decided November 9, 1942.)

The question here considered is whether the petition of the debtor, Marine Harbor Properties, Inc., was filed in good faith under Chapter X of the Bankruptcy Act.

The debtor's sole asset is an apartment building subject to a first mortgage of $370,000, under which certificates have been issued. There are also junior mortgage creditors and other claimants; but the property is concededly worth less than the amount of the first mortgage. A plan of adjustment was promulgated in 1934 by the Superintendent of Insurance under the provisions of the Schackno Act, a state statute, by which the mortgage was extended and the interest reduced. Over two-thirds of the certificate holders assented to the plan and the New York court approved it. Later the New York Mortgage Commission succeeded the Superintendent of Insurance as administrator of certificated bonds and mortgages and this Commission proposed a new mortgage trustee under a declaration of trust granting broad powers to the trustee. This proposal also was consented to by two-thirds of the certificate holders and approved by the state court in an order providing that the court should retain jurisdiction over the proceeding until there had been a complete liquidation and determination of the trust and permitting any interested party to apply at the foot of the decree for further relief.

The principal was not paid in 1937 and finally in April, 1941, default was made in payment of interest and taxes. The Trustee then instituted foreclosure proceedings in the state court. A receiver was appointed and took possession. In September, 1941, the debtor filed a voluntary petition under Chapter X of the Bankruptcy Act and an *ex parte* order was entered approving the petition and appointing a trustee. Shortly thereafter the mortgage trustee moved to vacate that order and to dismiss the bankruptcy petition as not filed in good faith. The motion was denied, but the Circuit Court of Appeals reversed, one judge dissenting.

On certiorari the decree was affirmed by the Supreme Court in an opinion by Mr. Justice DOUGLAS. He points out that the statute provides that a petition under Chapter X must be dismissed if the judge is not satisfied that it was filed in good faith. Section 146 defines "good faith" and provides in part:

"Without limiting the generality of the meaning of the term 'good faith,' a petition shall be deemed not to be filed in good faith if—

* * *

"(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior preceeding."

The opinion refers to the legislative history of the Act and points out that Congress did not go as far in the exercise of the bankruptcy power as it might have, but stopped short of removing jurisdiction from other tribunals in favor of the bankruptcy court where the interests of creditors and stockholders would be better served by permitting the prior proceedings to continue.

In the instant case, the Supreme Court concludes that the debtor did not sustain the burden imposed by the statute. In this connection, Mr. JUSTICE DOUGLAS, pointing out that the interests of stockholders would not be adversely affected by continuance of the foreclosure proceedings, observes:

> We are of the opinion, however, that the debtor did not sustain the burden which the federal statute places on a petitioner. So far as the "interests" of stockholders are concerned it is not apparent that the equity owners would be denied in the state foreclosure proceedings benefits, advantages, or protection which Ch. X would afford them. Admittedly the property is worth less than the amount of the first mortgage indebtedness. Under the rule of *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, and *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, a plan of reorganization would not be fair and equitable which in such circumstances admitted the stockholders to participation, unless the stockholders made a fresh contribution in money or in money's worth in return for "a participa-

tion reasonably equivalent to their contribution." . . . That rule obtains under Ch. X as well as under its predecessor, § 77B. There is no suggestion in the record that the equity owners desire to make a contribution on that basis and that unless they are allowed to do it under Ch. X, they will be barred. All that the record shows is an affidavit by one Silverman that "if the creditors desire liquidation of their claims on the basis of present actual values rather than on the face amount of their claims," $50,000 in cash could be raised. Ch. X would not permit such a dilution of creditors' interests. Hence such a showing does not establish on behalf of the stockholders that "need for relief" which § 130(7) read in light of § 146(4) requires. In fact, the approval of the petition on that ground would be giving the equity owners a nuisance value wholly unjustified by the reorganization standards which are incorporated into Ch. X.

An examination of the position of the certificate holders led to the further conclusion that it was not in their interests to proceed under Chapter X. Distinguishing the case from *Securities and Exchange Commission* v. *United States Realty & Imp. Co.*, 310 U.S. 434, 448-450, Mr. Justice DOUGLAS says:

> . . . here the machinery of the state which is being used is the foreclosure proceeding which so far as appears has been invoked on behalf of the certificate holders alone. Presumptively, the result of the foreclosure will be an appropriation of the assets of the debtor for the benefit of the certificate holders exclusively. There is no showing that the foreclosure proceedings have been conducted in such a way as to jeopardize the interests of the certificate holders contrary to the design of Ch. X. There is no showing that assets subject to the payment of the certificates are being neglected. Thus it is not shown that the claim against the guarantee company is not being pursued or that its collection could better be handled in proceedings under Ch. X. There is no showing that the machinery employed or available in the state foreclosure proceeding to safeguard and protect the interests of those creditors *after* the sale is not comparable to that contained in Ch. X for the consummation of plans which are not only fair but feasible. § 221(2). In view of the burden on a petitioner to make the showing required by § 130(7) and § 146(4), the bankruptcy court is not warranted in assuming without more that a state foreclosure proceeding instituted for and on behalf of the first mortgage creditors exclusively is inadequate, measured by Ch. X standards, to protect their interests. The contrary course would result in Ch. X making greater inroads on prior proceedings than § 130(7) and § 146(4) indicate was the purpose.

The case was argued by Mr. Arthur E. Friedland for the petitioning debtor, by Mr. Chester T. Lane for Securities and Exchange Commission, by Mr. Charles E. Hughes, Jr., for the bank and by Mr. Benjamin Heffner for the State of New York as amicus curiae.

SUMMARIES

Contracts—Government Standard Form of Construction Contract—Equitable Adjustment for Increased Costs Due to Changed Specifications—Questions of Law and Fact

U. S. v. Callahan Walker Construction Company, 87 Adv. Op. 91; 63 Sup. Ct. Rep. 113; U. S. Law Week 4026. (No. 65, decided November 9, 1942.)

This case involves the interpretation of a standard form of Government construction contract. The Construction Company bid for the construction of a levee on the Mississippi River bidding 14.43c per cubic yard on a section involving 3,881,600 cubic yards of earthwork. The contract reserved to the Government the right to make changes to carry out the intent of the contract or to meet unanticipated conditions, but no such modification was to be the basis for a claim for extra compensation except as provided in the regular form of contract.

When the work was partly finished, it was found necessary to make a change to correct a tendency toward subsidence. This involved about 64,000 additional cubic yards. The Construction Company protested against the change order and took the position that an extra price should be allowed because the additional work would cost more than the 14.43c per cubic yard bid and that the order was not within the terms of the contract.

A provision of the contract provides that all disputes concerning questions of fact shall be decided by the contracting officer, subject to an appeal by the contractor within thirty days to the head of the department, whose decision shall be final as to all questions of fact. Here the Construction Company did not appeal from the order of the contracting officer to the department head but, upon completion of the work, accepted final payment under protest and later brought action for additional cost over the 14.43c paid for the extra work. The Court of Claims awarded the recovery. On certiorari the judgment was reversed by the Supreme Court in an opinion by Mr. Justice ROBERTS.

The Court concludes that the matter in dispute here subject to equitable adjustment had to do with matters of fact as to which a decision of the contracting officer or department was final. Decisions defining fair and equitable treatment in reorganization proceedings under the Bankruptcy Act are held to be not in point.

The case was argued by Mr. Richard S. Salant for the Government, and by Mr. Robert A. Littleton for the contractor.

Contracts—Government Standard Form of Construction Contract—Equitable Adjustment on Account of Delay

United States v. Rice and Burton, 87 Adv. Op. 87; 63 Sup. Ct. Rep. 120; U. S. Law Week 4022. (No. 31, decided November 9, 1942.)

The claimant here obtained a judgment against the Government under a standard form of construction contract, under which the claimant had agreed to install certain equipment in a veterans' home to be built at Togus, Maine. Due to an unsuitable soil condition changes became necessary in the building site and in certain specifications. This delayed the claimant's work. The contract provides that changes may be made and

if they cause an increase or decrease in the amount due or in the time required for performance, an equitable adjustment shall be made.

The changes in question here were made the basis of a readjustment. The amount payable to the claimant was reduced by about $1,000 because of construction economies under the changed plan. On the other hand the Government waived claim to liquidated damages because of an extension of the time. The claimant was paid the full amount for the work which it did and sued for $26,000 alleged damages for delay for which the Government was allegedly responsible.

The court of claims held that the Government was liable for damages resulting solely from delay and allowed a recovery of $9,349. On certiorari, the judgment was reversed by the Supreme Court in an opinion by Mr. Justice BLACK. It holds that the changes in specifications resulting in delay were not a breach of contract by the Government as the contract reserved the right to make changes.

The Court further holds that consequential damages resulting from delay are not recoverable, but that equitable adjustment on account of delay entitles the contractor only to an extension of time whereby the claimant is relieved of liquidated damages, which otherwise could have been imposed.

The case was argued by Mr. Valentine Brooks for the Government, and by Mr. R. Aubrey Bogley for the contractors.

Appellate Jurisdiction—Highest Court of a State

Osment v. Pitcairn, 87 Adv. Op. —; 63 Sup. Ct. Rep. 21. (No. 140, decided October 12, 1942.)

In this per curiam opinion it is declared on the authority of *Scheufler v. Manufacturing Lumbermen's Underwriters*, decided July 7, 1942, that certiorari must be denied for lack of jurisdiction because the case was determined by a single division of the Supreme Court of Missouri and was not transferred to the court en banc. *Gorman v. Washington University*, 316 U. S. 98, was also cited.

State Taxation—Exemptions—Record on Appeal

Hughes v. Wendell, 87 Adv. Op. —; 63 Sup. Ct. Rep. —; U. S. Law Week —. (No. 176, decided November 16, 1942.)

The lessee of a 99-year perpetually renewable lease from an educational institution of property owned by it, appealed from a judgment of the Superior Court of Ohio disallowing lessee's claim of exemption from county taxes. The record on appeal did not set the lease and the summary thereof was declared by the Court in its per curiam opinion not adequate to enable them to determine the lessee's rights. Appeal dismissed.

The Crafts of Law Re-Valued

(Continued from page 803)

To deal with any of the agencies, a lawyer must understand that adversary's case. See that case, in terms of what it has of reason and of sense, and then use a lawyer's ingenuity in invention and persuasion, and you find few good administrators who cannot follow any decent way of working out your client's basic need. And that takes you to the heart of the matter; for it is when an unreasonable administrator will not listen to *that* kind of argument that you can win your case in court, upon review.

Vision and sense for the whole, and skills in finding ways, smoothing friction, handling men in *any* situation, with speed, with sureness: these mark our best. These things the country needs, and does not know good lawyers have. Indeed, even as we look upon our best, and know them, we do not ourselves see that they have merely found the way back to what all along has been the true heart of our craft. Our appellate courts have for two decades been piling up work and a tradition of work along these lines. Yet most of us, instead of welcoming that as boon and glory, have still shaken our heads, ploughed on along the dying lines of legalism, lost cases that we ought to have been winning. I say again, if *we* do not awake fully to what our craft is, if we do not make it both vocal and a living, reckonable thing, how may we expect our lay fellow Americans in troubled crisis to know these services they need, and we can give?

RECENT PUBLICATIONS

A STUDY OF THE LAW OF OPINION EVIDENCE IN ILLINOIS, by Willard L. King and Douglass Pillinger. 1942. Chicago: Callaghan & Co. Pp. XII, 389. $6.00.

THE UNITS OF GOVERNMENT IN THE UNITED STATES: AN ENUMERATION AND ANALYSIS, by William Anderson. 1942. Chicago: Public Administration Service. Pp. 47. $1.00 (paper).

THE PULLMAN STRIKE: THE STORY OF A UNIQUE EXPERIMENT AND OF A GREAT LABOR UPHEAVAL, by Almont Lindsay. 1942. University of Chicago Press. Pp. XI, 385. $3.75.

LIE DETECTION AND CRIMINAL INTERROGATION, by Fred E. Inbau, 1942. Baltimore: Williams & Wilkins Co. Pp. VI, 142. $3.00.

THE UNITED NATIONS ON THEIR WAY: PRINCIPLES AND POLICIES, by Henri Bonnet. 1942. Chicago: World Citizens Association. Pp. IX, 170. 50 cents (paper).

GOALS FOR AMERICA: A BUDGET OF OUR NEEDS AND RESOURCES, by Stuart Chase. 1942. New York: Twentieth Century Fund. Pp. VIII, 134. $1.00.

ARTICLES OF WAR ANNOTATED, by Col. Lee S. Tillotson. 1942. Harrisburg, Pa.: Military Service Publishing Co. Pp. XIX, 266. $2.50.

A COMPENDIUM ON INTERFERENCE, by Francis A. Shaw. 1942. Muncie, Ind.: Pioneer Publishing Co. Pp. XXXIX, 1066. $10.00

CURRENT LEGAL PERIODICALS

By KENNETH C. SEARS

Professor of Law, University of Chicago

Civil Liberties

Civil Liberties in War Time, by Arthur Garfield Hays, in 2 The Bill of Rights Review 170. (Spring, 1942.)

One of our chief crusaders for free speech is apparently against all prosecutions for utterances that had been instituted at the time he wrote. The memory of the prosecutions for utterances during World War I is "horrible". If a single one of those prosecutions was justified, no mention is made of it. Fear of administration of the 1940 Alien Registration Act is made manifest. It is admitted that "Speech may be curbed at all times when it directly incites to unlawful conduct". That sounds simple but its application seems to defy the wit of man. What and who will determine the speech that "directly incites"? It is apparent that Brother Hays lacks faith in juries for this purpose. He discusses very briefly the indictments of Christians, Fahl, Pelley, Noble, and Jones, and the order that banned "Social Justice" and disapproves of all of them. The evacuation of the Japanese from the west coast is even more strongly condemned. The general thesis is that criticism is essential to the efficient conduct of the war. Expression relieves the emotions and is better than underground propaganda. Mr. Hays hardly seems to recognize that persistent agitation can damage the war effort by breaking down the morale of others. I know of no formula to solve the problem but up to the present I am on the side of the Department of Justice rather than on Mr. Hays' side.

Judicial Administration

Federal Judicial Conferences and Councils: Their Creation and Reports, by Lewis W. Morse; *The Place of the Administrative Office in the Federal Court System,* by Henry P. Chandler, in 27 Cornell L. Qu. 347, 364.

The two papers by Professor Morse and Mr. Chandler are rather prosaic. They could hardly be otherwise and still be accurate. Professor Morse sketches the history of our lower federal court system. It was hardly a system until the Act of 1922 provided for a Conference of Senior Circuit Judges. Progress continues under the Act of August 7, 1939, providing for Councils of Circuit Judges and establishing the Administrative Office of the United States Courts under the direction of the Conference. Professor Morse concludes: "These advances in judicial reform are already returning dividends in the form of a coordinated and more efficient system in which local and general procedural defects are being remedied, improved facilities and procedures are being provided, and the dispatch of the judicial work is becoming progressively more expeditious. It would seem that there is rich promise in the future of the administration of justice in the federal judicial system." Mr. Chandler, in discussing the Administrative Office, disclosed the two principal aims behind its creation, the functions of the Director, the four divisions of the office and the work that has been accomplished. "Unity in the federal judicial system is growing."

Legal Philosophy

The Creed of Americanism, by Raoul E. Desvernine, in 17 Notre Dame Lawyer 216. (March, 1942.)

From the Declaration of Independence is obtained the five tenets of our political faith: (1) belief in a personal God and in a divinely created and ordered universe; (2) man is a creature of God and is endowed by God with certain inalienable rights; (3) the State is merely the creature of man and can consequently have only those powers which are conferred upon it by man; (4) men have equality before the law even though they do not have equality of capacity; and (5) it is the Christian man who has the liberty to carry out his divinely appointed mission in a divinely ordered universe and thus pursue his happiness. Acceptance of this creed on faith is the only thing that makes one an American. So says Mr. Desvernine; but his formula seems narrow and dogmatic to me. Likewise, I do not agree with his indictment of "our law schools" as "powerful forces in fomenting and intellectually nurturing the present revolution." The proof offered for this is another charge that "our law schools are the 'breeding-ground' of" the new cult of sociological jurisprudence. "Our courts are not only being packed with apostles of this new faith but our court decisions are being packed with alien ideologies." This sounds like the wail of a Liberty-Leaguer!

Martial Law

The Law of Martial Rule and the National Emergency, by Charles Fairman, in 55 Harvard L. Rev. 1253. (June, 1942.)

Fifty pages of good and rather easy reading that was prepared before the recent trial of the German saboteurs. Aside from a brief consideration of the English law, the first consideration is an examination of the decision

in *Sterling v. Constantin*, an outstanding landmark. It is outstanding because it makes it possible to ignore a considerable number of decisions in state and lower federal courts that had proceeded on the general theory that a governor had a free hand in the declaration of martial law. In the past there have been many ridiculous instances of such action. Now it is clear that a governor may not enforce a proclamation of martial law when its basis is notoriously false. A useful review of *Ex parte Merryman*, the *Prize* cases, *Ex parte Vallandigham*, and *Ex parte Milligan* leads to a condemnation of this dictum in the majority opinion in the *Milligan* case: "Martial rule cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." This doctrine does not go far enough to meet the conditions of modern war. This is exemplified by the martial law declared in Hawaii following the attack upon Pearl Harbor and by the removal of citizens of Japanese ancestry from the Pacific coastal belt.

Penology

Dead-End Justice, by Joseph N. Ulman, in 33 Journal of Cr. Law and Criminology 6. (May-June 1942.)

Every day sixteen hundred and fifty criminals, many of them desperate characters with records of three or more previous convictions, are turned out of prisons. Thirty-five per cent of all crimes of violence are committed by persons less than twenty-five years old. Between forty and sixty per cent of the offenders commit new crimes within a few months after their release from prison. "Let the punishment fit the crime." That is a silly song! Here is the correct idea: "Let us first of all protect society, and let us do it by making the treatment fit the man." This is the plan: Pass the Youth Correction Authority Act prepared under the auspices of the American Law Institute. The central idea of this Act is that youths between sixteen and twenty-one convicted of serious crimes will be placed in the custody of the Authority, which "is to be composed of persons specially qualified for the performance of their duties." This act seems to be worth a trial but it is difficult to understand how it will work satisfactorily in a state like Illinois where the appointments to the Authority would probably be pawns in the game of political patronage, and where it is believed that the trial judge can adequately determine the "punishment" that is needed by each prisoner who comes before him.

Private Corporations

Current Phases of Derivative Actions against Directors, by Ralph M. Carson, in 40 Michigan L. Rev. 1125. (June, 1942.)

"It is clear that the stockholder's derivative suit is an absolutely necessary arm of equity jurisdiction and that, when used with justice and restraint, it has both public and private value." On the other hand, it is apparent that Mr. Carson believes that there has been an abuse in the promotion of this type of suit. His impression is that three-fourths of these suits are without foundation and result in no recovery. Of the remaining fourth, where some recovery has been achieved, it is suggested that half of them should have been decided otherwise. This type of law suit imposes a "crushing labor" on the courts. Hence, a reform is proposed. It would restrict a derivative suit, whenever the plaintiff is acting for five per cent or less of the total outstanding stock of the corporation, to a suit for only that proportion of the alleged loss as the percentage of the stock represented. This restriction, it seems fair to predict, would be in effect a prohibition; but it would not apply if the plaintiff representing the five per cent or less secured the consent of a majority of the stock at a special meeting called for that purpose. It would appear that this proposed reform would result usually to prohibit a derivative suit unless the plaintiff represented more than five per cent of the stock. Most of Mr. Carson's article discusses the defense to these suits that is labelled the "business judgment rule" and the exceptions to this defense, viz., fraud, directors subject to outside domination, *ultra vires* conduct, diversion of corporate property, and negligence. Why are these suits brought? It is guess but it would seem that there are lawyers, and perhaps others, who are frequently willing on a contingent fee basis to take a gamble on long odds.

Taxation

The Partnership under the Federal Tax Laws, by Jacob Rabkin and Mark H. Johnson, in 55 Harvard L. Rev. 909. (April, 1942.)

A combination of partnership law and taxation law is apt to be strong medicine for any lawyer. Accordingly it was no fun to attempt to read this article. Apparently, however, it has valuable information for those who must solve problems of the type discussed. Two items are of more general interest. (1) "The excess profits tax has precipitated a wholesale liquidation of closely-held corporations and their replacement by partnerships. . . . It is not feasible, of course, for publicly held enterprises to operate in anything but a corporate form. For the closely held business, however, corporate existence has become an expensive luxury. The partnership, despite its practical inconveniences, appears to be the economical alternative." (2) The old struggle between the entity and co-ownership concepts of a partnership is present in the taxation problems, and the decisions and regulations have wavered between the two concepts. "If the essential 'non-entity' of the partnership is recognized, most of the partnership problems will ultimately crystallize into an intelligible tax pattern."

BOOK REVIEWS

Mr. Justice Holmes, by Francis Biddle. 1942. Scribner's. Pp. 214.—Mr. Biddle has contributed to the rapidly accumulating Holmes literature a biographical essay which is not only welcome but needed. Indeed, this volume does a great service to the memory of Holmes for it accomplishes its declared purpose of rescuing Holmes "from the adulation that has blurred the sharpness of the reality."[1]

Mr. Biddle's qualifications for his task are almost unique. He was for a time Holmes' secretary (1911-1912) and the friendship then formed lasted until the end. There were, during all the subsequent years, frequent contacts which enabled the former secretary to keep current upon the events that never ceased to occur in the mind of Holmes.

Moreover, Mr. Biddle, from the vantage points of circuit judge, solicitor general and attorney general, closely followed, perhaps with more than a sympathetic interest, the vicissitudes of Holmes' philosophy of constitutional law and as a participant in the struggle saw what had been a forlorn hope become a victorious and irresistible advance.

Mr. Biddle's method is well adapted to his purpose. Brevity is an advantage. It gives sharpness to the outline which would be lost in a longer study. The analysis and selection are admirable. There is no long dissertation upon Holmes' opinions. For any other treatment than that adopted "the whole picture is too balanced, too rich, too amazingly complete."

The approach is effective: first, broad strokes, later filled in with and supported by facts, quotations and personalia. The numerous anecdotes of the anonymous secretary—the author, no doubt—are revealing and greatly help in the portrayal.

The result is conviction that this is an authentic likeness and that many of the other attempts are imaginary portraits.

The man we see is a great personality, working in the medium of the law. As Mr. Biddle puts it, Holmes looked at life through the window of the law. Though he chose the law as "a pathway of expression" he might have chosen any one of a number of other pathways and yet have expressed "the integrated maturity of his life." Whatever his weapon he would still have fought at the frontier. This versatility may have somewhat handicapped him as a judge, for always the world called and called in his ears. True, Lord Haldane thought Holmes second not even to Marshall, and John Morley called him the greatest judge of the English-speaking world. It is doubtful whether these verdicts will stand. It is more likely that he will be remembered as one who lived and talked and wrote in the grand manner, as one whose preeminence as a judge "was the reflection of his stature as a human being."

Unquestionably, however, Holmes was a great judge. Two concepts will remain to his everlasting credit. The first was his service in pointing out, as he did so brilliantly in *The Common Law,* that "the felt necessities of the time" really determine or at least should determine "the rules by which men should be governed." This should have exploded forever, though it did not, the fallacy that judges do not legislate but merely discover the law. The other was his eloquent advocacy of legislative freedom.

The first of these was Holmes' lesser achievement. Though he put his conception in words that marched and carried conviction, it was not original. Moreover, on the Supreme Judicial Court of Massachusetts, where he worked in the broadest field, he did not always adhere to his creed and certainly did not expound it with any evangelical fervor. Perhaps he had not then become sure of himself and was unwilling to be a lone dissenter. It is interesting to compare Holmes and Cardozo. Their fundamental concepts were not unlike. Yet Cardozo reached his peak when, on the Court of Appeals of New York, he worked in the medium of the common law, while Holmes did not freely assert himself until he reached the Supreme Court.

The second achievement of Holmes was not the mere searching analysis of a talented theorist. It was the courageous leadership of a man of action. Here his dominating personality, his tolerance, his courage and what Mr. Biddle well describes as his terse and inevitable style and his "immortal opinions with their wisdom, sweep and poetry" made him the leader of a school of thought which has finally triumphed.

As a judge Holmes had the defects of his qualities. He was somewhat impatient with the drudgery of his work; he did not possess Brandeis' marvelous capacity for details and for analyzing and marshalling facts. Perhaps his versatility and his innate poetic instinct worked against him in this. But if he did not see all the trees he always saw the forest.

Those who demand an idealized Holmes will not find him here. They will find, told in a style with a subdued strain of poetry not unlike that of Holmes himself, the story of a great personality with "an eager appetite for life." (On the whole, he wrote Lady Pollock, "I am on the side of the unregenerate who affirm the worth of life as an end in itself as against the saints who deny it"). They will find one whose sayings "had the rare quality of tempered irony," whose "words were feathered arrows that carried to the heart of the target from a mind that searched and saw"; one who expressed his personality in *The Common Law,* in his opinions, in those rare and tantalizingly brief speeches, his

1. Quotations, unless otherwise indicated by the context, are from the volume under review.

"chance confessions of faith and doubt," and those occacional articles which, in the preface to his *Collected Legal Papers,* he called "little fragments of my fleece that I have left on the hedges of life." Above all, they will find one who in the last letter[2] he ever wrote, confessed, "perhaps I am inordinately fond of courage but I have been allowed during the course of my life to see something of it . . . the battlefield is not the only repository of that quality," and who always consistently acted in accord.

WALTER P. ARMSTRONG

Memphis, Tennessee

---

2. This is an unpublished letter which Justice Holmes wrote to Paul M. Herzog, who has just been appointed Chairman of the New York State Labor Relations Board. Mr. Herzog had sent the Justice a letter from Oliver Wendell Holmes, Sr., to Mr. Herzog's aunt. A copy of this letter was received by Mr. Biddle too late for inclusion in his biography and it is here reproduced with the permission of Mr. Herzog and Mr. Biddle:

"1721 Eye Street, N.W.,
Washington, D. C.,
January 26, 1935.

"My dear Herzog:

"The young fellow brought in the letters from my father to your aunt. It seems almost incredible they could have been written a half century ago.

"Perhaps I am inordinately fond of courage but I have been allowed during the course of my life to see something of it. To see a woman blind from birth (or so I have been told) get so much out of life only convinces me that the battlefield is not the only repository of that quality.

Very sincerely yours,
(Signed) O. W. Holmes."

W. P. A.

Public Policy, edited by Carl J. Friedrich and Edward S. Mason (Yearbook of Graduate School of Public Administration, Harvard University.) 1942. Pp. VII, 275.—This is another of the many earnest but usually abortive efforts to make a consistent and interesting whole of dissimilar views of different writers upon divers subjects, by binding them under the ligature of a common but wholly inadequate title. I have never liked such symposiums and this one has not increased my liking for them. For the result reminds me of Elihu Root's famous definition of the Democratic party of 1904, "A fortuitous concourse of unrelated prejudices." But for the fact that among the dust-dry and largely inconsequential withes which make up the bundle there is a good address by Wyzanski and one green and flowering rod, Riesman's *Civil Liberties in a Period of Transition*, the book would be a total loss to me and I think to most lawyers. Riesman's article is however greatly challenging, thought-provoking and altogether worthwhile in its general treatment of this most interesting question. But to "proud but uncritical inheritors of a great liberal tradition," like myself, "under the influence of the natural rights view of civil liberties, the Protestant Lockian derivative of much earlier intellectual strains which was carried by the English Colonists to America," and has been so long entertained there, it is quite startling not merely in its implications but in some of the things that it downrightly declares. As such an inheritor, and so influenced, I have always considered that the civil liberties the constitution guarantees are the general property of all the people without regard to their class or group level, economic, racial or religious. Having had some active part not so long ago in opposing the efforts of the Ku Klux Klan to select favored and reject unfavored citizens as beneficiaries of these rights, it is most unpalatable to me to hear that our civil liberties constitutionally guaranteed to us as persons, and not as group or class members, are ours if and only if we belong to a dominant class or group, and then only until some more powerful class or group seizes and dominates the government and abrogates or limits the liberties of those less powerful than themselves. It will certainly take a good deal more than Mr. Riesman's arguments to convince me that constitutionally guaranteed civil rights are guaranteed only so long as groups, or classes, or organizations lack the power to dominate enough public opinion to abrogate them by statute. I have always known of course that all of the guaranteed freedoms were qualified to the extent that "free" as used in them means free in accordance with decent and right thinking. I have never thought, no intelligent person could think, that these freedoms authorize slander, libel, treason, sedition or any other criminal act. But I and most of us have thought that their bottom bed-rock significance, what really made them count, was that though our views might be opposed to the views or even the will of the dominant majority, this would not at all deprive us of the right to entertain and express them.

Sound and vigorous in insisting that civil rights must be recognized, Riesman is quite unorthodox and I think unsound in his view that the civil liberties with which most of us are familiar are merely the result of middle class views, that they are valid only so long as another dominant class or organized group does not legislate them away, and that it is the duty of organized society or government to form public opinion as to what are the most desirable values, and then suppress any of the former supposed freedoms, including freedom of speech and press, which do not agree with that opinion.

Concreting his point he thus sets up what he regards as the final test of whether a particular liberty exists. "What must be done where such conflict is presented is to see it not only in terms of an abstract, philosophical, constitutional argument but also as a part of a social struggle which cannot be decided without the community's making a choice of its social goals and of the methods it has prepared for their achievement."

In thus advancing the view that the majority may make a choice between views, and, having chosen wisely (but what is wise?), may then suppress inconsistent views, Mr. Riesman not only lays himself liable to all the arguments which have been leveled against "the

certitude" of the natural law men, but, it seems to me, gives aid and comfort to Fascism and the Party Line.

Said Mr. Justice Holmes in his *Natural Law*, "Certitude is not the test of certainty. We have been cocksure of many things that were not so." . . . "While one's experience makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else and this again means skepticism." . . . "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere." . . . "Deepseated preferences cannot be argued about and therefore when differences are sufficiently far-reaching we try to kill the other man rather than let him have his way, but that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as our own."

JOSEPH C. HUTCHESON, JR.

Houston, Texas

A Manual for Bar Examiners, prepared and sponsored jointly by the Association of American Law Schools, the National Conference of Bar Examiners, and the Section of Legal Education of the American Bar Association; preface by Stanley T. Wallbank. 1940. Pp. vii. 117.

Examinations In Contract Law Courses, by Edward F. Potthoff. Studies in Higher Education, No. 2. 1942. University of Illinois. Pp. 100.

The bulk of what has been written on bar examinations has appeared in the last fifteen years. It has consisted chiefly of monographs dealing with aspects of the problem. *The Manual for Bar Examiners* is the first and the best existing handbook compiled to aid those who must struggle with the difficulties of preparing and grading papers. It presents a comprehensive survey of the practical considerations which must be taken into account in the preparation of questions, the limiting of subject matter, the administration of the examination, and the technique of grading. It is largely the work of Sheldon D. Elliott, a recognized authority in this field.

A tendency toward subjectivity in relation to their work is a danger which confronts many examiners. Questions are often deceptive and do not reveal what they should of the applicant's abilities. Methods of marking, however theoretically sound, sometimes produce strangely variable distortions when their overall results are compared with such results at the next examination.

Prior to 1900 most examinations were oral. The applicant's bearing and some sampling of the amount of legal information he possessed were the determinative factors. Until 1920 written examinations were frequently mere memory tests, providing scant insight into reasoning power, and disregarding completely any relative evaluations. Since 1920, however, much investigation and improvement have taken place. It is now recognized, for instance, that if Jones gets a mark of 80 and stands tenth in a class of 1000, the examination discloses something different about him than if he gets a mark of 80, and stands nine hundredth.

Modern research has three objectives: improvement in the technique of question draftsmanship, analysis of exactly how various types of questions function, and statistical analyses of the operation of the mechanism as a whole.

The *Manual* canvasses its subject thoroughly and completely. It will be equally valuable to the student of theory and to the examiner whose interest in doing the job before him outweighs other considerations.

Mr. Potthoff's critique is more abstract. It is not designed for bar examiners primarily. It is a masterly analysis of the objectives of testing, as such, and of the construction and functioning of true-false, multiple choice and essay type questions. No bar examiner who reads it can fail to gain insight into his own work, whether he finds the procedures set forth immediately applicable, or not. When yet more work has been done with the thoroughness, and presented with the clarity which Mr. Potthoff exhibits in his monograph, examiners will know a great deal more about the implements with which they work than they do now.

Neither publication attempts to explore the subconscious motivations which research shows to be so influential in the ever-present struggle for symmetry in all measurement processes. What scale the examiners unconsciously, yet actually, tie to—an established pass mark, a flexible pass mark, or still more elusive criteria *dehors* the examination; how cancellation of error within the grading process itself operates; by what improvements or extensions the whole mechanism can be related more effectively to the educational process, and to the society of the bar, and many cognate questions, remain for further study. But, in addition to being sound practical contributions, these books do lay the foundation for clearer thinking about the ultimate possibilities and the inherent limitations of the process, as a whole.

PHILIP J. WICKSER

Buffalo, New York

The Law of Property in Shakespeare and the Elizabethan Drama, by Paul S. Clarkson and Clyde T. Warren. 1942. Baltimore: The Johns Hopkins Press. Pp. xxvii, 346.—Numerous attempts have been made, perhaps most notably by the British Lord Chancellor Campbell, to show that Shakespeare must have had

legal training; or that the writer of the plays ascribed to the actor from Stratford must have been Francis Bacon or some other person learned in law. Convinced that such attempts have not been based on adequate investigation, the "gluttons for punishment" whose book is now in hand have during the last eleven years, as they say, assembled all legal references in the plays, not merely of Shakespeare, but also of seventeen of his chief contemporaries and early successors up to about 1635. The comparative treatment thus made possible is new and very valuable, for if—as seems to be the fact—plays by other men, known not to have been lawyers, display as much legal knowledge as the Shakespearean plays, the argument from internal evidence that Shakespeare must have served a term as a lawyer's clerk obviously falls.

The volume in question, dealing only with property law, is but the first of a projected series. Similar treatises on Criminal Law, Marriage and Divorce, The Law of Equity in the Drama, Trial Scenes in Elizabethan Drama, are promised; and it is to be hoped that the sponsoring Johns Hopkins Press, or some other publishing house, will continue and complete the series.

It was undoubtedly difficult to adapt plan and treatment, as was clearly desirable, both to students and teachers of the English drama and to lawyers and non-specialists with literary interests; but, though there are some "tough nuts" for the non-legal mind, the authors have on the whole succeeded remarkably well in their purpose. Part I, 175 pages, deals with "The Law of Real Property" in eleven logically arranged chapters; Part II, very briefly (because of scanty references in the plays), with "The Law of Personal Property"; and Part III, nearly a hundred pages, with "The Law of Descent, Distribution, Wills, and Administration." In each chapter, or subdivision of a chapter, the gist of the law on the topic in hand, as it existed in the days of Elizabeth and James I, is first explained, and then references in the plays to the particular point, or uses of its terminology, are discussed. Explanations are intended to be sufficiently untechnical for comprehension by any intelligent reader, and the lawyer may test the accuracy of the statements by means of innumerable references to such authorities as Coke on Littleton, Blackstone, etc. In relation to the plays a good many errors of previous annotators are convincingly exposed, so that it will be important for future editors to make use of this book, whether or not further study results in agreement in specific cases with interpretations here given.

The plays read number nearly three hundred, by practically all of the most important dramatists active between 1585 and 1635. Since Thomas Nashe's only play (except for whatever hand he had with Marlowe in *Dido, Queen of Carthage*) is entitled *Summer's Last Will and Testament*, it might have been taken into account; and because of the close association of William Rowley with Middleton (as well as his collaboration with other playwrights of the group included) omission of him seems questionable. Perhaps this was because his work has never been collected separately, and it is true that the most important plays in which he had a hand were among those read. Omission of James Shirley is hardly to be criticized, for, though he began producing plays before 1635 and was of considerable importance, a large part of his work came later.

Thanks probably, at least in part, to duly acknowledged guidance in Elizabethan scholarship by Professor Hazelton Spencer of Johns Hopkins, the authors seem exceedingly well informed on the literary side of their research—and this reviewer is willing to take the legal side on faith. The documentation is imposing and well arranged. The following passages from the "Conclusion" seem justified by the mass of evidence that has preceded: "Our reading of the plays revealed that about half of Shakespeare's fellows employed on the average more legalisms than he did—some of them a great many more. For example, the sixteen plays of Ben Jonson (whose apprentice years were spent in laying bricks, and certainly not in copying deeds and drafting pleadings) have a total of over five hundred references from all fields of the law. This surpasses Shakespeare's total from more than twice as many plays. Not only do half of the playwrights employ legalisms more freely than Shakespeare, but most of them also exceed him in the detail and complexity of their legal problems and allusions, and with few exceptions display a degree of accuracy at least no lower than his. . . . It is accordingly our conclusion that what law there is in Shakespeare can, indeed *must*, be explained upon some grounds other than that he was a lawyer, or an apprentice, or a student of the law."

GEORGE L. MARSH

University of Chicago

John G. Johnson: Lawyer and Art Collector, by Barnie F. Winkelman. 1942. University of Pennsylvania Press. Pp. 327.—Although John G. Johnson died only twenty-five years ago he is already a somewhat legendary figure. This is partly due, no doubt, to the assiduity and success with which during his lifetime he shunned office and publicity. While Mr. Winkelman merely so hints it seems certain that both President Garfield and President Cleveland offered him a place as a justice of the Supreme Court of the United States and that he also declined to become Attorney General in the cabinet of President McKinley.

Notwithstanding the fact that he consistently refused to accept any public office, he remained, because of the nature and importance of the causes he conducted, excellent newspaper "copy," which was largely unavailable for use as a result of his own disinclination to lend himself to this form of exploitation.

These characteristics of Johnson largely account for the portrait this volume gives. Whether it is a true likeness only those who knew the subject in the flesh

can judge. In any event it is a vivid picture and one that is likely to be accepted as authentic.

We are shown a man whose talents were unusual, whose capacity for work was prodigious and whose career, for one of his potentialities, was almost unique.

He came of hardy stock by way of a father who was a blacksmith and a mother who lived until she was ninety-two. He not only inherited singular virility but matched it with an intellectual vigor which was all his own.

One with such natural endowments needed only a meagre opportunity. It is not surprising that by the excellence of his school work he should have earned employment in a law office, that there he should have made himself indispensable, and learned enough to be admitted to the bar. This is but the familiar success story of those who were on the make during the two and a half generations that Johnson's life spanned.

To him, however, fate was kinder than to most. First, the tired hands of older lawyers placed in his care the affairs of a leading and rapidly growing Philadelphia trust company at a time when trust law was in its infancy. Again, when he was at the plenitude of his powers the era of big business dawned, corporate mergers began to take shape and the battle against monopoly was joined. There was pioneering to be done in the law. Johnson not only had the pioneer spirit but other unrivalled qualifications: great force of character, superb self-confidence, an analytical mind, the ability to read page by page, and a photographic memory. Moreover, he had a single-hearted devotion to the law which was the despair, if not the envy, of his contemporaries and which has rarely, if ever, been equalled. He was not interested in becoming a business partner with his clients. General retainers did not tempt him. Outside the law—his art collecting aside—he was interested only in eating, reading detective stories and in watching an occasional baseball game. While devoted to his wife and stepchildren he took no part in their social activities and worked unbelievably long hours with apparent immunity to fatigue. The great cases he argued before the Supreme Court of the United States (of which only a few are noted below) [1] were but the outcropping of the deep strata of ordinary litigation, important and unimportant, that lay beneath.

He was an individual as well as a general practitioner, at home in all branches of the law, and he accepted all kinds of cases, trivial and epochal. It is said of him, with some degree of truth, that his fees were the smallest in Philadelphia and the largest in the country. He acquired a machine-like efficiency which enabled him personally to dispose of more cases than any other individual lawyer has ever handled in this country.

Even such a phenomenon must have felt the need for

1. *United States vs. E. C. Knight Co.*, 156 U. S. 1. *Northern Securities Co. vs. United States*, 193 U. S. 197. *Harriman vs. United States*, 197 U. S. 244. *Blair vs. Chicago*, 201 U. S. 400. *United States vs. Delaware & Hudson Railroad Co.*, 213 U. S. 366. *Standard Oil Co. of New Jersey vs. United States*, 221 U. S. 1. *United States vs. American Tobacco Co.*, 221 U. S. 106. *Wilson vs. New*, 243 U. S. 332.

some outlet and Johnson found his in collecting paintings. The potential versatility of the mind which refused to be diverted from the law is disclosed by the taste and discrimination, combined with unfailing canniness, with which he collected. Here too he relied on his own judgment not only in selecting pictures, but in writing and having privately printed a slender volume in which he appraised the artistic value of many canvases. It should be added that in the opinion of connoisseurs most of his judgments were vindicated.

Why did Johnson condemn himself to a lifetime of hard labor? He could have retired a quarter of a century before his death with an income ample to supply every possible want. His wife predeceased him and he had no direct descendants to whom to leave the fortune he had acquired. His paintings were insured for millions and these he bequeathed to the city of Philadelphia. It could not have been for fame. He shrank from any public mention of himself and his achievements. It could only have been from a fanatical devotion to the law such as has at times possessed other men, but rarely with such unabating intensity.

Such is the life-like picture Mr. Winkelman paints. We turn away from it with the feeling that here was a life unfulfilled. To me another great lawyer once said regretfully that he had spent a long life fighting in the petty quarrels of others. Johnson apparently had no regrets. Yet we can not refrain from speculating upon what one with his rugged character, rare endowments, inexhaustible energy, and a broader vision might have accomplished for the profession, for his state, and for the nation.

WALTER P. ARMSTRONG

Memphis, Tennessee

ANDRES BELLO

(Continued from page 825)

in Argentina, Texeira de Freytas in Brazil, Manuel Lorenzo de Vidaurre in Peru[5] and Eduardo Acevedo in Uruguay.

The history of the attempts at codification extends from 1811 to 1855, the year of the enactment of the Bello Civil Code. The nation had to think first of its constitutional structure, but the proposed Constitution of 1811 contained a provision for the creation of a commission for drafting new legislation, and so did the proposed Constitution of 1818. A bill was introduced in 1826 creating a commission, but died a quiet death. In 1831 the vice president memorialized Congress to engage a distinguished jurist, full time, for that purpose, with the pay of a Justice of the Supreme Court, with the view of following the best codes then in force in Europe. The bill was approved, but due to the fact that in 1832 the Constitution was to be amended, they logically decided to postpone the statutory legislation until after the final amendments of the fundamental law of the land had been approved.

Again and again, in 1833 and 1835 and 1840, bills were introduced, the president sent messages to Congress, etc., and at last in the latter year a National Congressional Commission was created. Bello was a member thereof. He presented to it his draft on the subject "Succession Causa Mortis" as part of the Civil Code, which was discussed and published. Imbued deeply with democratic principles, he wanted the public at large, lawyers, professors, judges and others to contribute their bit. But in this he was disillusioned. The times were turbulent due to the war against the Peru-Bolivian Confederation (1837-1839) ending with a victory for Chile at the Battle of Yungay, but uncertainty followed for some time in political circles.

Bello never flinched; he continued working indefatigably until 1852, making one, two or more drafts, amending, adding, cutting and perfecting each and every draft, perfection his goal and aspiration.

And then one day his opportunity came. The Lincoln of Chile, Manuel Montt, risen from humble beginnings, a self-made man, became president. He was seriously interested in education and public administration. Those attributes Bello could understand and on such interests they both had spiritual communion. In 1852, when everybody had relegated the matter to oblivion, Bello presented his polished jewel to the president, who acted thereon energetically, and in the following year the government published it. Things happened rapidly thenceforward: the public interest grew; Congress authorized the president to appoint a commission; the "Project" was distributed among judges of all the courts and among the faculty of law, many of whom made reports thereon; another commission was created to revise the work so far done and to review the "Project"; the final revision was finished and sent to Congress accompanied by a Presidential Message of Transmittal, penned by Bello himself, dated November 22, 1855. This message is considered a literary jewel, a masterpiece of legal brevity and of far-reaching importance.

Even at that stage the finished masterpiece was in danger of being destroyed or mutilated. It was proposed that the "Project" be taken up and considered article by article, but Bello was opposed to this procedure and insisted that it be considered as a whole. His ideas prevailed. Upon its approval the effective date thereof was set for New Year's Day, 1857. The Chamber of Deputies ratified it on December 14, 1855.

No wonder a state funeral was given, and so many monuments have been erected, to this poet who never wrote a farewell ode to his Muse, nor vacillated in his unflinching labors, to the everlasting glory of American arts and science.

5. Vidaurre's Project of a Civil Code prepared in 1834 never received the baptism of promulgation. It was framed principally on the Prussian Civil Code; secondly on the Spanish legislation; and on the Canon Law. In 1936 Peru enacted a new Civil Code based, as Vidaurre's Project, chiefly on the Prussian Code.

BAR ASSOCIATION NEWS

State Bar of California

FRANK B. BELCHER, Los Angeles attorney, was unanimously elected president of the State Bar of California at its annual meeting held September 11, in Los Angeles.

FRANK B. BELCHER
President, State Bar of California

He succeeds Philip H. Angell of Berkeley.

Other officers elected were A. T. Shine of Oakland, vice president; W. P. Rich of Marysville, vice president; John A. Hewicker of San Diego, vice president; Russell F. O'Hara of Vallejo, treasurer; and Jerold E. Weil of San Francisco, secretary.

State Bar of Michigan

DEAN W. KELLEY, of Lansing, was elected president of the State Bar of Michigan for the coming year at the annual meeting of the Board of Commissioners held in Detroit November 7, 1942. Mr. Kelley has been a member of the Board of Commissioners since November 1, 1938, and has served as treasurer and vice president of the organization prior to his election. He also represented the State Bar of Michigan in the House of Delegates of the American Bar Association in 1938, and since 1938 he has represented the State of Michigan as a Commissioner on Uniform State Laws.

Other officers elected at the meeting include Charles M. Humphrey, of Ironwood, first vice president; Wilbur N. Burns, of Niles, second vice president; Ben O. Shepherd, of Detroit, secretary, and Carl H. Smith, of Bay City, treasurer. Two new commissioners began their duties at the annual meeting of the board. Paul W. Chase, of Hillsdale, succeeds Charles H. Farrell, of Kalamazoo, whose term as commissioner expired and who declined to permit his name to be placed in nomination to succeed himself. Ferris D. Stone, of Detroit, past president of the Detroit Bar Association, succeeds retiring State Bar President Fred G. Dewey, of Detroit, who left the board upon the expiration of his term as president

In lieu of its own annual convention, the State Bar of Michigan joined this year with the Detroit Bar Association in entertaining the annual meeting of the American Bar Association at Detroit.

DEAN W. KELLEY
President, State Bar of Michigan

Missouri Bar Association

THE sixty-second annual meting of the Missouri Bar Association was held at Columbia, September 24-26.

President John Rhodes, of Kansas City, suggested in his annual address that a committee be appointed to investigate the workings of the state courts. After amendment to limit the investigation, at least for the present, to the appellate courts, his suggestion was approved and the following committee was appointed: Jacob M. Lashly, St. Louis, chairman; William H. Becker, Columbia; John H. Lathrop and John W. Oliver, both of Kansas City; James M. Reeves, Caruthersville; and James Austin Walden, Moberly.

ROLAND F. O'BRYEN
President, Missouri Bar Association

Outstanding addresses were delivered by Associate Justice Hugo L. Black, Supreme Court of the United States; Talbot Smith, of OPM on the subject, "Price and Rationing Enforcement"; Paul V. McNutt, chairman, War Manpower Commission, and by George Maurice Morris, president of the American Bar Association.

Mr. Morris outlined the war work program of the organized bar and in closing said:

> Win this war we will, but we shall lose it if, in the struggle to win it, we have neglected our principal duty to our state and to the world. In practical application of this doctrine, as long as we are able, we must maintain those of our activities and those of our thoughts which go to promote the administration of justice and to advance science, to those objectives, not only because we are lawyers, but because we have accepted them as a trust from those men of the law who founded the association in whose interest we are meeting tonight.
>
> Now, this doctrine does not promote business as usual, nor does it overlook the possible necessity of reduction in scale of some of our activities nor does it overlook a possible necessity of reanalysis, of emphasis, but it does mean that while we fight this war with all of our might, we shall hold fast, ever faster, to those spiritual ideals which give the American Bar its soul.

A proposal to repeal Missouri's constitutional amendment, passed two years ago, providing for an appointive judiciary, was defeated.

The following officers were elected to serve for the year: Roland F. O'Bryen, St. Louis, president; James A. Potter, Jefferson City, secretary; and Julius H. Drucker, St. Louis, treasurer.

Montana Bar Association

KEYED to the lawyers' part in war, the Montana Bar Association held its fifty-sixth annual meeting at Missoula, August 7 and 8. Participating in the program were L. E. Glennon, president of the Idaho State Bar, of Pocatello, Idaho; A. N. Whitlock, chief counsel for the Chicago, Milwaukee, St. Paul & Pacific Railroad, Chicago; Fred A. Ironside, Jr., Director of Budget and Administrative Planning, United States Post Office Department; and Captain Milton E. Wertz, Office of General Counsel, Selective Service System.

Officers elected for the coming year were: W. E. Keeley, Deer Lodge, president; Marshall Murray, Kalispell, secretary-treasurer; Julius J. Wuerthner, Great Falls, delegate to the House of Delegates, American Bar Association.

The meeting closed with a banquet at which Tom J. Davis, president of Rotary International, 1941-42, and a Butte lawyer, was the principal speaker.

State Bar of New Mexico

THE 18th Annual Meeting of the State Bar of New Mexico was held at Sante Fe on October 16 and 17. In the absence of President Everett M. Grantham, who is now

A. K. MONTGOMERY
President, State Bar of New Mexico

lieutenant, senior grade, in the United States Navy, stationed at San Diego, First Vice President A. K. Montgomery presided.

The address of welcome was delivered by Carl H. Gilbert of Santa Fe, to which Jose E. Armijo of Las Vegas, now a yeoman in the United States Navy, responded. Addresses were delivered by Hiram M. Dow of Roswell on the subject "Legal Problems Relating to Oil"; by Judge John C. Watson of Santa Fe on the subject "The Extra-Legal Interest of Early New Mexico Decisions"; by Jethro S. Vaught, Jr., of Albuquerque on the subject "Administrative Procedure in New Mexico and Court Decisions with Reference Thereto"; by George L. Reese, Jr. of Albuquerque on the subject of "A Few Comments Regarding the Office of Price Administration"; by District Judge A. W. Marshall of Deming on the subject "Delinquent Juveniles"; and by Major Andrew J. Lewis of the United States Army on the subject "Selective Service".

At the banquet Judge H. A. Kiker of Santa Fe was toastmaster, and John W. Vincent, an official of the Federal Bureau of Investigation, stationed at Los Angeles, delivered the principal address, his subject being "The Home Front". Colonel Russell C. Charlton of Santa Fe, who is director of Selective Service for New Mexico, spoke on the subject "Unity During the War".

Officers for the year 1942-1943 are: President, A. K. Montgomery, of Santa Fe; First Vice President, Judge A. W. Marshall, of Deming; Second Vice President, Waldo H. Spiess, of Las Vegas; Secretary-Treasurer, Herbert Gerhart, of Santa Fe.

The North Carolina State Bar

THE ninth annual meeting of the North Carolina State Bar was held in Raleigh on Friday, October 23, President W. B. Rodman, Jr., of Washington, presiding. Welcome was extended by former Governor J. C. B. Ehringhaus, and the response was made by W. L. Mann, president of the Thirteenth District Bar.

Governor J. M. Broughton delivered an excellent address on the subject "The Courts and The Public," reminding attorneys that the courts are a public function financed by taxes, that the public has a vital interest in the speedy administration of justice, and therefore that the public has a right to expect the officers of the courts to do away with needless delay, lost motion, and wasted time. He urged the cooperation of the judges and lawyers to the end that the business of the

courts, which is the business of the public, be speedily and properly conducted.

Carl McFarland, of Washington, D. C., former Assistant Attorney General of the United States, and chairman of the American Bar Association Section on Administrative Law, gave an address dealing with the administrative process and function. He pointed out that, while federal regulations dealing with the administrative procedure had been hampered by the war, nevertheless the several states could make great progress now in this field. He pointed out the slowness and technicality of the present procedures and gave to the audience much information as to the definitions of the administrative process.

The first speaker on the afternoon program was Colonel John D. Langston, chairman of the National Planning Council of Selective Service Headquarters, Washington, D. C.

One of the highlights of the meeting was the address of Judge W. C. Harris of Raleigh, Senior Judge of the Superior Courts of North Carolina. His audience delighted in his humorous attacks upon his fellow members of the Bar and recognized genuine merit behind the humorous barbs directed at them. He suggested among other things that lawyers' speeches to the jury be rationed and that they be required to devote at least a part of the time during argument to a discussion of the facts and issues in the case.

Marshall T. Spears of Durham was elected president; Frank S. Spruill of Rocky Mount first vice president; Fred J. Coxe of Wadesboro second vice president; and Edward L. Cannon of Raleigh will continue to act as secretary.

Approximately the same number of members were present for this meeting as were present last year, despite the problems of travel and the large number of members now in the armed forces.

EDWARD L. CANNON
Secretary

Oregon State Bar

THE eighth annual meeting of the Oregon State Bar was held at Eugene, on September 3 and 4 with an attendance of more than three hundred lawyers from the state.

Retiring President Arthur K. McMahan, of Albany, in a short but stirring address, predicted that, if failure in the present conflict should overtake this country, civilization would experience another dark age and he reminded the legal profession

GUNTHER F. KRAUSE
President, Oregon State Bar

that it now is confronted with the gravest responsibility since the birth of the Nation. He called upon every lawyer not already in the armed service to be ready and prepared to place his services upon the altar of freedom.

The secretary's report showed that large numbers of lawyers are being called into the military services and probably more than one-third of the membership will be in the armed forces before another year is out.

One of the outstanding events of the convention was the address of Dean Wayne L. Morse, University of Oregon Law School, now a member of the National Labor Relations Board, in which he contended that there is practically no limit to the power of the Board in war time because it stems from the President, whose powers under the Constitution are such that he can take almost any necessary steps to protect and preserve that Constitution.

Colonel Joel S. Watson of the staff of the Judge Advocate of the United States Army in San Francisco spoke of the war powers of the President and pointed out that General Andrew Jackson probably was the first in this country to make use of the phrase "military necessity" and that he evacuated the French from New Orleans on that basis in much the same fashion that the Japanese have been evacuated from the western coastal area in this war. He told some of the problems of that evacuation.

Reports of several committees containing recommendations were acted upon and in particular one report with which the committee submitted a revised Probate Code was ordered to a referendum of the membership.

The Board of Governors elected as officers for the following year: Gunther F. Krause of Portland, president; and Herbert P. Welch of Lakeview, vice president. F. M. Sercombe and Arthur H. Lewis, both of Portland, were re-elected secretary and treasurer respectively.

F. M. SERCOMBE,
Secretary

Wyoming State Bar

THE annual meeting of the Wyoming State Bar was held in Casper on September 4 and 5, and was well attended.

Feature addresses were those of Retiring President H. S. Harnsberger on the subject—"Why a Bar Association"; Senator Joseph C. O'Mahoney, on the subject "The Place of the Lawyer in Post-War America"; and M. S. Reynolds, on the subject "The Organized Bar and Its War Work".

The principal topics of discussion were the functions of the Bar in the war effort, legislative reforms and statute revision.

L. A. Bowman, of Lovell, was

(Continued on page 857)

JUNIOR BAR NOTES

By HUBERT D. HENRY

Secretary Junior Bar Conference

DESPITE the fact that the Junior Conference has lost the active participation of 1,050 of its members who are now in military service, Chairman Joseph D. Calhoun has succeeded in establishing a full complement of state chairmen and committee personnel. The willingness of our members to accept positions of responsibility in the Junior Bar War Program has been inspiring to the officers who have worked continuously since the Detroit meeting to set up a vigorous organization.

The Public Information Program, heretofore exclusively a Junior Bar project, is now under the jurisdiction of the Committee on Coordination and Direction of War Effort. A number of public information directors have already been appointed from Junior Bar ranks. This valuable work will be expanded under the leadership of Robert E. Freer, Washington, D. C.

The following persons have been appointed to head national committees now being selected by Chairman Calhoun: Earl Morris, Columbus, Ohio, chairman of Committee on Aid to the Small Litigant; Lyman Tondel, Jr., New York City, chairman of the Committee on Conservation of Law Practice; Paul M. Strack, Newark, N. J., chairman of the Committee on Cooperation with Inter-American Bar Association; Philip H. Lewis, Topeka, Kansas, director, Procedural Reform Studies; Albert E. Jenner, Jr., Chicago, and Stephen Simes, Portsmouth, N. H., associate directors, Procedural Reform Studies; Charles B. Stephens, Springfield, Illinois, chairman of Committee on Relations with Law Students; and R. David Kreitler, Philadelphia, Pa., chairman of Committee on Restatement of the Law.

The applications for affiliation with the Junior Bar Conference of the Committee on Junior Bar Activities of the Delaware State Bar Association, of which David F. Anderson and William Poole, both of Wilmington, are chairman and secretary, respectively, and of the Younger Lawyer's Conference of the Kentucky State Bar Association, of which Ridley M. Sandidge, of Owensboro, and Watson Clay, of Louisville, are president and secretary, respectively, have been approved by the Council. With the affiliation of these two groups, all state junior bar organizations are now affiliated with the Conference.

The members of the Central Committee of the Junior Bar Section of the Detroit Bar Association for the current year are: Rowe A. Balmer, chairman; William J. Oldani, secretary; George L. Cassidy, chairman, Legal Studies Committee; James H. Dingeman, chairman, Membership Committee; Benjamin W. Jayne, chairman, Social Committee; and

State chairmen of Junior Bar Conference who have accepted appointment

Alabama	Irvine C. Porter	Birmingham
Arizona	W. E. Craig	Phoenix
Arkansas	Blake Downie	Little Rock
California	Gunther Detert	San Francisco
Colorado	Edward J. Ruff	Denver
Connecticut	Morton A. Elsner	Hartford
Delaware	David F. Anderson	Wilmington
Dist. of Col.	Turner T. Smith	Washington
Florida	Neil C. McMullen	Tampa
Illinois	James H. Wheat	Champaign
Indiana	Walter Myers, Jr.	Indianapolis
Kansas	Harry T. Coffman	Lyndon
Kentucky	Charles Wylie	Lexington
Louisiana	Haywood H. Hillyer, Jr.	New Orleans
Maine	Oscar Fellows	Bangor
Maryland	C. Keating Bowie, Jr.	Baltimore
Massachusetts	Charles F. Goodale	Boston
Michigan	James S. Miner	Owosso
Minnesota	George P. Hoke	Minneapolis
Mississippi	Frank E. Everett	Vicksburg
Missouri	Wm. H. Hoffstot, Jr.	Kansas City
Nebraska	John M. Jepson	Omaha
New Hampshire	Charles W. Robey, Jr.	Concord
New Jersey	Paul T. Huckin	Englewood
New Mexico	G. T. Hanners	Lovington
North Dakota	Thomas W. Degnan	Grand Forks
Ohio	John K. Bartram	Marion
Oklahoma	Charles A. Kothe	Tulsa
Oregon	Robert Leedy	Portland
Pennsylvania	Paul Kern Hirsch	Pittsburgh
Rhode Island	Dana M. Swan	Providence
South Carolina	Patrick H. Nelson	Columbia
South Dakota	W. R. McCann	Brooking
Tennessee	E. W. Hale	Memphis
Utah	Gordon Christenson	Salt Lake City
Vermont	Louis Lisman	Burlington
Virginia	Wm. Rosenberger	Lynchburg
Washington	George V. Powell	Seattle
West Virginia	Wayne A. Rich	Charleston
Wisconsin	Clarence P. Nett	Milwaukee
Wyoming	R. Dwight Wallace	Evanston

John R. Mann, chairman, Public Relations Committee.

The Junior Bar Section of the Ohio State Bar Association held its annual meeting on October 23 at Akron and elected James Reed, Marion, president, and William Van Aken, Shaker Heights, secretary.

The officers of the Younger Members Committee of the Chicago Bar Association for the current year are: Morris I. Leibman, chairman; Roger A. Baird, vice chairman; and Richard James Stevens, secretary.

Luke White, of Indianapolis, is the new chairman of the Young Lawyer Section of the Indiana State Bar Association. New officers of the Junior Bar Section of the Colorado Bar Association are: Edward J. Ruff, Denver, chairman; Sidney E. Shuteran, Denver (now in the Navy), vice chairman; and Truman Stockton, Jr., Denver, secretary-treasurer. Lawrence R. Hatch, Urbana, and French Fraker, Champaign, were reelected chairman and secretary of the Champaign County (Illinois) Junior Bar Association.

The Junior Bar Conference of the State of California held no meeting in 1942, and the last year's officers will continue. They are: William Thomas Davis, Los Angeles, president; George P. Tobin, Oakland, Prentiss Moore, Los Angeles, and James H. Freeman, Washington, D. C., vice presidents; and Calvin L. Helgoe, Los Angeles, secretary-treasurer. The Barristers Club of Oklahoma City and the Junior Bar Association of Jackson, Tennessee, have been disbanded until the end of the war.

Charles E. Beardsley, of Los Angeles, first chairman of the Junior Committee of the Los Angeles Bar Association, has furnished us with the first year's report of this group. This very likely was the original junior bar organization. The first meeting was held on May 24, 1928, with about 145 persons in attendance. The name was decided upon, and the age limit placed at five years after admission to practice by examination in California. The committee was set up as a committee of the association. No extra dues were to be charged. Two meetings were held in 1928, and at the third meeting, held January 31, 1929, new officers were selected. The meetings were devoted to addresses by men of prominence who discussed various matters of interest to young attorneys. The purposes of the committee were to broaden the acquaintance of young attorneys with older members of the bar and the judges, to assist in the senior bar program, to facilitate discussions among younger attorneys, to promote high standards of practice and the welfare of the younger lawyers. The report shows that the members of the committee took a very great interest in bar matters, and that their initiative was soon followed by other cities.

BAR ASSOCIATION NEWS

(Continued from page 855)

L. A. BOWMAN
President, Wyoming State Bar

elected president; M. S. Reynolds, of Cheyenne, vice president; H. S. Harnsberger, of Lander, American Bar delegate; and L. C. Sampson, of Cheyenne, secretary.

L. C. SAMPSON,
Secretary

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACTS OF CONGRESS OF AUGUST 24, 1912, AND MARCH 3, 1933

Of American Bar Association Journal, published Monthly at Chicago, Illinois, for October 1, 1942.

State of Illinois } ss.
County of Cook }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Edgar B. Tolman, who, having been duly sworn according to law, deposes and says that he is the Editor-in-Chief of the American Bar Association Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, as amended by the Act of March 3, 1933, embodied in section 537, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, American Bar Association, 1140 N. Dearborn St., Chicago, Ill.; Editor-in-Chief, Edgar B. Tolman, 30 N. LaSalle St., Chicago, Ill.; Managing Editor, there is none; Business Manager, there is none.

2. That the owner is: American Bar Association, George Maurice Morris, President, American Security Bldg., Washington, D. C.; Harry S. Knight, Secretary, Sunbury Trust & Safe Dep. Bldg., Sunbury, Pa.; John H. Voorhees, Treasurer, Bailey-Glidden Bldg., Sioux Falls, S. D.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

Edgar B. Tolman,
Editor-in-Chief

Sworn to and subscribed before me this 6th day of October, 1942.

(SEAL) Howard B. Bryant.

(My commission expires May 25, 1946.)

PROFESSIONAL ETHICS COMMITTEE

OPINION No. 245
Filed June 20, 1942

CANON 29—A lawyer for the plaintiff in a divorce proceeding should not on request, recommend local counsel to represent the defendant.

An officer of a local bar association, who is also a member of the American Bar Association, has asked our opinion on the following question:

> Is it unethical for the plaintiff's attorney, in a divorce proceeding, upon the specific request of out-of-state counsel for the defendant, to recommend the name of an attorney to represent the defendant in the local courts? If the foregoing question should be answered in the affirmative, would it be unethical for the attorney to recommend the names of two or more attorneys?

The opinion of the committee was stated by MR. DRINKER, Messrs. Phillips, Brown, Miller, Houghton, Brand, and Jackson concurring.

A divorce obtained by collusion between the parties is invalid. For a lawyer to assist a party to obtain such a divorce is improper and unethical.

A lawyer should not only refrain from unethical practices, but also from suspicion thereof.

For plaintiff's lawyer in a divorce proceeding to recommend the name of another local attorney, or the choice of several, to represent defendant in the local courts would naturally raise a suspicion of collusion which should be avoided.

OPINION No. 246
Filed June 20, 1942

CANON 28—Stirring up litigation—Stirring up strife or litigation is unprofessional.

CANON 13—CONTINGENT FEES—Contract for a contingent fee where sanctioned by law is permissible. Client should remain responsible to lawyer for expenses advanced by latter.

A member of the Association submits the following inquiry:

"A lawyer is employed by the small stockholder in a large corporation that has a number of subsidiaries. The stockholder thinks that the directors and officers are appropriating to their own use the income and assets of the corporation, so that the value of his stock has been very much depreciated and for many years no dividends were paid, and after investigation the attorney concludes that the stockholder has just grounds for his complaint, but on account of the small amount of his stock, as well as his financial ability, he is not able to stand the expense of procuring the audit of the various books of the company, so as to disclose the true situation. Under such circumstances would the lawyer be justified,

"(1) for the primary purpose of assisting his client, to purchase stock in such corporation (if he considered it a sound investment) in order that he and his client would hold enough stock to justify standing the expense of procuring such audit, or

"(2) if the lawyer could not purchase the stock personally, would he be justified in advising other outsiders to do so? Would his doing so violate Canon 10, or any other Canon?

"(3) assuming that the audit probably would increase the value of the stock or might result in a stockholder's suit. In this state contingent fees are recognized by statute, and the attorney by local custom is permitted to advance to his client the necessary expenses to conduct his suit when the client is not financially able to do so."

The opinion of the committee was stated by MR. JACKSON, Messrs. Phillips, Brown, Drinker, Houghton, Miller and Brand concurring.

(1) Canon 10 provides:

> The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

The purchase of shares of stock in the corporation by the lawyer is a purchase by the lawyer of an interest in the subject matter of litigation to be instituted and conducted by the lawyer for the purpose of putting an end to the alleged appropriation by the officers and directors to their own use of income and assets of the corporation. A successful suit would better the value of the stock to the advantage of its holders and so the lawyer would profit from his purchase, as well as from compensation for his services. Canon 10 is clearly violated.

(Continued on page 861)

LETTERS TO THE EDITORS

Editorial Note: This department is beginning to expand because of the growing interest and deep concern of the bar in our efforts to hasten the day of our country's victory.

We, therefore, print here excerpts from interesting letters which touch those questions.

To the Editors:

In your October number you publish a guest editorial from *The Times* (weekly edition), London, August 5, 1942, with respect to the United States of America (Visiting Forces) Act, 1942 (5 & 6 Geo. 6, c. 31), recently passed by the British Parliament, in which the British Government recognizes the exclusive jurisdiction of American courts-martial over American military and naval personnel in the United Kingdom. The heading of the editorial is "An Epoch in Jurisdiction", and in the text is found the word "revolutionary".

It is submitted that the use of these terms is not justified. As far back as 1812, in *The Schooner Exchange v. McFaddon* (7 Cranch 116, 139), Chief Justice Marshall said:

> 3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
>
> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

Similar language was used by the Supreme Court in *Coleman v. Tennessee* (97 U.S. 509, 515), and in *Dow v. Johnson* (100 U.S. 158, 165), Chief Justice Marshall's opinion in the case of *The Exchange* has been praised and followed by eminent British judges. In *The Parlement Belge* (5 Prob. Div. 197, 208, Brett, L. J., said:

> The first case to be carefully considered is, and always will be, *The Exchange*.

More recently in *Ching Chi Cheung v. The King* (1939 A.C. 160, 168), Lord Atkin called Marshall's opinion "a judgment which has illumined the jurisprudence of the world".

Many American, British, and other writers on international law declare that the troops of Nation A in Nation B by B's invitation or consent, are subject only to their own courts-martial and not to the local courts. Among others may be mentioned Wheaton (sec. 95), Hyde (Vol. I, sec. 247), Hall (7th ed. sec. 56), Lawrence (6th ed. sec. 107, p. 246), Oppenheim (4th ed. Vol. I, sec. 445), and Clunet (Journal du Droit International, Vol. 45, pp. 514, 516).

During the first World War the British and French governments made an agreement whereby they recognized the exclusive competence of the tribunals of their respective armies with regard to persons belonging to those armies (Foreign Relations of the United States, 1918, Supp. 2, p. 735). Later, the United States and France made a like agreement (same, pp. 735, 737). Similar agreements were made between France and other allies whose troops were on her soil. A similar agreement was reached in principle between the United States and Great Britain; but, as the armistice supervened and the American troops were withdrawn from the British Isles, it was not formally executed (same, pp. 751, 752, 754, 760). But, so far as is recalled by the writer and others who were in a position to know the facts, no American soldier was tried by a British court during the first World War.

The recognition of the exclusive jurisdiction of American courts-martial by the United States of America (Visiting Forces) Act, passed a few weeks ago, instead of marking an epoch, or being revolutionary in character, is in accord with legal theory, as laid down by Chief Justice Marshall and the leading writers on international law, and with the practice of the first World War and of other wars.

The present letter is merely a comment by a member of the Association, and not an official communication.

ARCHIBALD KING,
Colonel, J.A.G.D., U.S. Army

Dear Mr. Morris:

* * *

Some five or six weeks ago I read in one of the daily newspaper columns which come out of Washington some remarks about various classes of "non-essential" occupations, which, so the columnist predicted, would quite definitely be invaded in the next draft. I quote what the author was pleased to call his "rough description" of these kinds of people:

> One hundred seventy-three thousand lawyers whose labors are not essential, one million, two hundred thousand retail clerks, fifty thousand waiters and bartenders, sixty thousand actors and stage door johnnies, forty thousand beauticians and barber shop operators, twenty thousand gamblers connected with race tracks or roulette joints.

The columnist's prediction with respect to all these non-essential persons was as follows:

> As a result of the revelations, the Selective Service or Manpower Commission will soon issue a "work or fight" order to individuals in these classes. If they are within the conscription limits, they must join the Army or Navy or enter some industry manufacturing munitions, *regardless of age or number of dependents.*

* * *

The nature of the problem presented seems fairly self-evident without too much elaboration. How far, and in what form, the organized Bar ought to concern itself with them may be quite a debatable question in view of the difficulty of separating the elements of public interest and of self-interest involved. But my feeling is that in these days of strongly organized minority and "pressure" groups, some interest ought to be taken.

* * *

MELVILLE F. WESTON

Boston, Mass.

Dear Mr. Morris:

* * *

I am impelled to write you on account of the fact that very often recently I have come across comments regarding the inefficiency of lawyers in the present war effort, particularly those connected with the administration of various agencies. A typical instance is that contained in the October 17, 1942, issue of the "Kiplinger Washington Letter," wherein it is stated:

> Lawyers: Another serious fault in WPB, OPA, and other war agencies, is that an excess quantity of lawyers are writing the orders going out, and these are understood by neither the administrators nor the public. This has become a scandalous source of what is known as "red tape."

* * *

It occurs to me this might be given consideration, and an effort made to bring to the Bar generally, and particularly to attorneys connected with the various agencies in the war effort, their responsibility in this regard, and to impress upon them the opportunity they have, by simplification of orders, contracts, procedures and memoranda, to rectify a real abuse.

W. C. FRASER

Omaha, Neb.

To the Editors:

The opinion of the Supreme Court in the spy case, just published, raises once more the questions of how similar spies would have been treated in Nazi Germany and whether the highest court in the country and a whole law machine would have been set in motion to decide the justice or injustice done to enemies of that country.

Spies are tried in Germany before a special court, the People's Court. Created in 1933 for the outspoken purpose of crushing any resistance to the Hitler regime, it has jurisdiction over what is termed in the German law as "attacks against the external security of the Reich." This People's Court is constituted by "reliable" Nazi judges. Its former president is now Reich Minister of Justice, its present president a former Secretary of State grown up in Nazi doctrines.

To question the constitutionality of this court, as was done with the Military Commission, would be sheer folly, since Nazi Germany has no constitution which could be violated. Germany's constitution is, as a leading German law professor and legislator held, Hitler's command. No court and no lawyer would question this "constitution." To question would occur to no one, because the individual has no rights which could be enforced with the help of a court. Whether he is tried by a civil court or the People's Court or whether he is tried at all, depends solely upon the discretion of the German Secret Police and its special prosecutor before the People's Court. Anyone can be shot without a trial and thousands upon thousands have been so shot.

As a consequence of this power over life and death the issue of citizenship raised before the Supreme Court is completely disregarded in Germany as far as political and other crimes are concerned. Even in times of peace Germany has maintained that anyone committing crimes within Germany's borders is liable to be punished according to the German law. An American citizen who was accused of having made an attempt against Hitler's life was executed in 1937 after having been sentenced by the People's Court. All the efforts of the American Consul in Berlin to save his life were futile. When, in a note to the German Foreign Ministry, the questions of justice and of a fair trial were raised, the Ministry declined to accept this note because it held that there is no injustice in Germany.

If American or German citizens, landed by submarine on the coast of Germany with the purpose of spying and committing sabotage, were caught, the questions of whether they would be put to trial and where would not be decided by any law or by any court. If the German Propaganda Ministry and the German Secret Police saw fit to stir up German public opinion with the help of such a trial, it would take place. If they should decide to the contrary, because German morale could not stand the fact of enemies landing within Germany's borders, nobody would ever hear of the trial. In any case questions of law are completely unknown.

ARNO HERZBERG*

Newark, New Jersey

*Practised law in Germany, but was forced to abandon career in April, 1933. Came to this country in September, 1938.

To the Editors:

The portraits on the covers of the JOURNAL are quite often worth preserving and in some instances I would like to frame them, but your publisher inserts the page number of the comment on the portrait in such a way that it cannot be removed without destroying the picture.

Is it not possible to place the reference of the page number of the comment at some other place or eliminate it entirely?

JOHN C. TOBIN

St. Louis, Mo.

To the Editors:

I have noted with interest and approval the "War Letter" (p. 612, September JOURNAL) to the effect: "Organized Bar Acts to Increase Study of American History."

It is suggested that one of the inaccuracies of history results from too much attention to personalities to the neglect of policies, measures and underlying reasons—relatively.

Correspondingly, in considerations of government in the United States, and in voting, too great a consideration is given to personalities and too little consideration to abstractions—yet we emphasize nothing (in current war time) more than that we live in a country *governed by law* rather than under the control of a dictator. (There are too many Hero Worshippers.)

We assert that American (and all) democracy will function far more effectively — efficiently and economically—when more people vote *rationally* for *something*, rather than *emotionally* for *somebody*. No personality in politics should be given consideration for anything other than *qualities* for the *office*—analagous to batting and fielding averages in baseball to determine the lineup.

F. G. SWANSON

Tyler, Texas

PROFESSIONAL ETHICS

(Contined from page 858)

(2) Canon 28 provides in part

> Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up . . . causes of action and inform thereof in order to be employed to bring suit . . . or to breed litigation by seeking out . . . those having . . . grounds of action in order to secure them as clients. . . .

For the lawyer to advise outsiders to purchase shares in order to spread among several the expense of the litigation is clearly a violation of Canon 28. The application to the second question put of the quoted words of the Canon is too obvious to require further discussion.

(3) A contract for a reasonable contingent fee where sanctioned by law is permitted by Canon 13, but the client must remain responsible to the lawyer for expenses advanced by the latter. "There is to be no barter of the privilege of prosecuting a cause for gain in exchange for the promise of the attorney to prosecute at his own expense." (Cardozo, Ch. J. in *Matter of Gilman*, 251 N. Y. 265, 270-271.)

REGIONAL MEETING

(Continued from page 796)

b. Principles Governing Renegotiation of War Contracts—Charles O. Pengra, Counsel for Renegotiation Board of War Department

c. What can be done to assist businesses dislocated by war economy? (Panel of outstanding authorities to lead discussion on ways and means of obtaining relief for such businesses.)

4. Problems and Practice of Emergency Court of Appeals — Hon. Fred M. Vinson, Chief Judge, Emergency Court of Appeals, and United States Circuit Judge for the Circuit Court of Appeals for the District of Columbia. (This discussion concerns the new Emergency Court of Appeals which was created to provide judicial review of acts of war regulatory agencies under the Price Control Act.)

***Luncheon*—Buffet luncheon without speakers**

2 P.M.

What the new 1942 Revenue Bill means to the lawyers and business.

These meetings are designed to give the practicing lawyer the greatest possible assistance, and every effort will be made to make the meetings informal discussion groups where those officials responsible for regulatory controls can be thoroughly questioned. It is essential that the lawyer understand the purpose and reason for the war time economic measures as well as the mere words of statutory or executive regulations. Only by knowledge of these purposes can the lawyers make the maximum possible contribution to the war effort in conveying to their clients, and to laymen generally, the real purpose and intent of our present wartime economy. These regional meetings will be dedicated to the task of aiding the lawyer in achieving his highest function in this critical time, or, in the words of the Attorney General, serving as a "liaison of reason" between the citizens and "the agencies responsible for making their freedom secure."

CLASSIFIED

BOOKS

SHAW ON INTERFERENCE—A PIONEER—Insurance Counselors: Interference between insurers, misrepresentation, incomplete comparisons, etc., 2 Chapters, cross-referenced to rest of volume. George v. Metropolitan, a pioneer, merits unreported except in this volume. Many other insurance considerations. Buckram—$10. PIONEER PUBLISHING CO., J. H. Wysor Bldg., Muncie, Ind.

FIRST EDITIONS: UNITED STATES AND Illinois Supreme Court Reports—complete set. Rare historical and legal documents. J. J. BERMAN, Suite 1432—25 East Washington Street, Chicago.

AMERICAN AND ENGLISH ANNOTATED cases, L. R. A., American Decisions, American Reports, American State Reports, California, New York, Massachusetts, Michigan and several other state reports. A large list of texts, various digests, statutes, session laws, etc. Write for complete list. THE DEMING INVESTMENT COMPANY, Oswego, Kansas.

WE BUY ENTIRE LAW LIBRARIES IN bulk, also fine libraries of general interest calculated to appeal to scholarly lawyers. Our buying proposition has been found singularly attractive by those who prefer selling everything at wholesale rates in one pleasant transaction. Correspondence (regarded as confidential) invited. Prompt responses. CLAITOR'S BOOK STORE, Baton Rouge, Louisiana.

LAW OFFICE ORGANIZATION BY REGInald Heber Smith. A complete book on necessary essentials for all attorneys. Reprint of four articles from May, June, July, August, 1940 issues. Price 25c. A. B. A. JOURNAL, 1140 North Dearborn St., Chicago. Dept. C.

ROBES

JUDICIAL ROBES—CUSTOM TAILORED—the best of their kind—satisfaction guaranteed—catalog No. 41 sent on request. MCCARTHY & SIMON, INC., 7-9 West 36 St., New York, N. Y.

RATES

10 cents per word for each insertion; minimum charge $1.20 payable in advance. *Copy should reach us by the 15th of the month preceding month of issue.*

BOOKS

USED LAW BOOKS BOUGHT AND SOLD. State Reports, Reporter System units, Digests, Amer. Law Reports, Text-Books, Encyclopedias, etc. Correspondence solicited. R. V. BOYLE, Colcord Bldg. Oklahoma City, Okla.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Documents, Second Edition," 736 Pages, 340 Illustrations. $10.00 Delivered. ALBERT S. OSBORN, 233 Broadway, New York City.

LAW BOOKS BOUGHT AND SOLD: Complete libraries and single sets. CLARK BOARDMAN CO., LTD., 11 Park Place, New York City.

LOWEST PRICES — USED LAW BOOKS complete stock on hand, sets and texts—Law Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSN., 538 S. Dearborn St. Chicago, Ill.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110—13th St. N. W., Washington, D. C.

HANDWRITING EXPERTS

NERNBERG, M. A. More than twenty-years experienced examiner of disputed documents and detector of forgery. Typewriting identification. Formerly specially employed by United States Government as handwriting expert in cases involving handwriting. 903 Law & Finance Bldg., Pittsburgh, Pa.

EDWARD OSCAR HEINRICH, B. S., 24 California Street, San Francisco. For additional information see MARTINDALE-HUBBELL LAW DIRECTORY, San Francisco listings.

STAMP COLLECTIONS

WE BUY STAMPS. VALUABLE STAMP collections are sometimes found in estates, and administrators seldom know where or how to sell them to advantage. We not only make appraisal for estates, but also pay top prices for collections, accumulations and old stamps on letters. Write for our free booklet "If You Have Stamps to Sell." H. E. HARRIS & CO. (World's Largest Stamp Firm), 108 Massachusetts Avenue, Boston, Mass.

MISCELLANEOUS

MAGAZINE BINDING: WE ASSEMBLE AND bind magazines. Have your old books, Bibles, and hymnals rebound. Durable! Attractive! Prices are reasonable. HECKMAN BINDERY, Dept. G, North Manchester, Indiana.

DELAWARE CHARTERS: 48-HOUR SERVice; fees moderate; submitted forms. CHAS. G. GUYER, INC., 901 Market Street, Wilmington, Del.

AMERICAN BAR ASSOCIATION JOURNAL
TOPICAL INDEX, 1942

(Note: The items marked with an asterisk indicate a leading article on the subject)

Civilian Defense:

Constitution of the United States:

Constitutional Law:

Corporations:

Courts:

Crime:

Criminal Law:

Democracy:

Due Process:

Evidence:

Government:

Impairment of Contract Obligation:

Improving the Administration of Justice:

Insurance:

International and Comparative Law:

Interstate Commerce:

Judicial Administration:

Judiciary:

Junior Bar Conference:

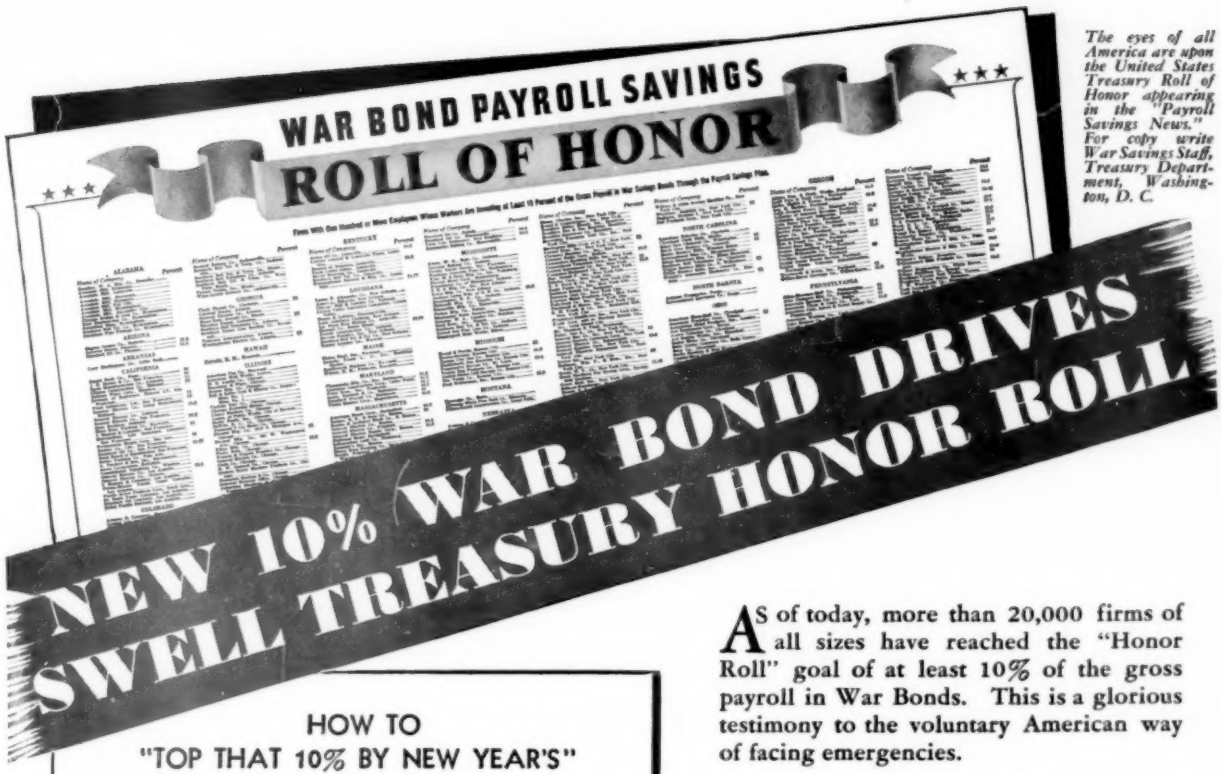
Supreme Court of the United States:

Cases before Supreme Court of the United States Reviewed:

Taxation:

War:

War Effort:



The eyes of all America are upon the United States Treasury Roll of Honor appearing in the "Payroll Savings News." For copy write War Savings Staff, Treasury Department, Washington, D. C.

HOW TO "TOP THAT 10% BY NEW YEAR'S"

Out of the 13 labor-management conferences sponsored by the National Committee for Payroll Savings and conducted by the Treasury Department throughout the Nation has come this formula for reaching the 10% of gross payroll War Bond objective:

1. ***Decide to get 10%.***
   It has been the Treasury experience wherever management and labor have gotten together and decided the job could be done, the job was done.
2. ***Get a committee of labor and management to work out details for solicitation.***
   a. They, in turn, will appoint captain-leaders or chairmen who will be responsible for actual solicitation of no more than 10 workers.
   b. A card should be prepared for each and every worker with his name on it.
   c. An estimate should be made of the possible amount each worker can set aside so that an "over-all" of 10% is achieved. Some may not be able to set aside 10%, others can save more.
3. ***Set aside a date to start the drive.***
4. ***There should be little or no time between the announcement of the drive and the drive itself.***
   The drive should last not over 1 week.
5. The opening of the drive may be through a talk, a rally, or just a plain announcement in each department.
6. Schedule competition between departments; show progress charts daily.
7. Set as a goal the Treasury flag with a "T."

As of today, more than 20,000 firms of all sizes have reached the "Honor Roll" goal of at least 10% of the gross payroll in War Bonds. This is a glorious testimony to the voluntary American way of facing emergencies.

But there is still more to be done. By January 1st, 1943, the Treasury hopes to raise participation from the present total of around 20,000,000 employees investing an average of 8% of earnings to over 30,000,000 investing an average of at least 10% of earnings in War Bonds.

You are urged to set your own sights accordingly and to do all in your power to start the new year on the Roll of Honor, to give War Bonds for bonuses, and to purchase up to the limit, both personally and as a company, of Series F and G Bonds. (Remember that the new limitation of purchases of F and G Bonds in any one calendar year has been increased from $50,000 to $100,000.)

TIME IS SHORT. **Our country is counting on you to—**

"TOP THAT 10% BY NEW YEAR'S"

EVERYBODY EVERY PAYDAY AT LEAST 10%

Save with

War Savings Bonds

Just Published

Executors and Administrators

In Volumes 33 and 34

CORPUS JURIS SECUNDUM

This Title includes general administration of decedents' estates under testamentary or judicial appointment; rights, powers, duties, and liabilities of executors or administrators in respect to the collection, management, and disposition of their testators' or intestates' estates; and legal proceedings relating thereto.

THE AMERICAN LAW BOOK COMPANY
Brooklyn New York